No. 04-1332

Title:	Richard Will, et al., Petitioners v. Susan Hallock, et al.
Docketed:	April 5, 2005
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Nos.:	(03-6221-cv)
Decision Date:	October 22, 2004
Rehearing Denied:	January 4, 2005

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Apr 4 2005	Petition for a writ of certiorari filed. (Response due May 5, 2005)
Apr 19 2005	Brief of respondents Susan Hallock, et al. in opposition filed.
May 6 2005	Reply of petitioners Richard Will, et al. filed.
May 10 2005	DISTRIBUTED for Conference of May 26, 2005.
May 31 2005	DISTRIBUTED for Conference of June 2, 2005.
Jun 6 2005	Petition GRANTED In addition to the Question presented by the petition, the parties are directed to brief and argue the following Question: "Did the Court of Appeals have jurisdiction over the interlocutory appeal of the District Court's order denying a motion to dismiss under the FTCA's judgment bar, 28 U.S.C. Sec. 2676?" .
Jul 18 2005	Extension of time within which to file petitioner's brief on the merits to and including August 22, 2005.
Jul 25 2005	Extension of time within which to file respondents' brief on the merits to and including October 17, 2005.
Jul 25 2005	SET FOR ARGUMENT on November 28, 2005.
Aug 5 2005	CIRCULATED.
Aug 16 2005	Proposed lodging of counsel for petitioners.
Aug 22 2005	Petitioners' lodging approved.
Aug 22 2005	Joint appendix filed. (Distributed)
Aug 22 2005	Brief of petitioners Richard Will, et al. filed. (Distributed)
Aug 23 2005	20 copies of an amended complaint from a case out of the N.D.N.Y. received and lodged.
Oct 7 2005	Brief of respondents Susan Hallock, et al. filed. (Distributed)
Nov 14 2005	Reply of petitioner Richard Will, et al. filed. (Distributed)
Nov 25 2005	Record received from U.S.C.A. 2nd Circuit. (1 envelope). U.S.D.C. for the Northern District of New York records are all electronically filed.
Nov 28 2005	Argued. For petitioners: Douglas Hallward-Driemeier, Assistant to the

Solicitor General, Department of Justice, Washington, D.C. For respondents: Allison M. Zieve, Washington, D.C.

No.

In the Supreme Court of the United States

RICHARD WILL, ET AL., PETITIONERS

v.

SUSAN HALLOCK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Tort Claims Act (FTCA)'s judgment bar, 28 U.S.C. 2676, provides that "[t]he judgment in an action under section 1346(b) of this title," *i.e.*, the statutory provision that grants subject matter jurisdiction to federal district courts over FTCA cases, "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." The question presented is:

Whether a final judgment in an action brought under Section 1346(b) dismissing the claim on the ground that relief is precluded by one of the FTCA's exceptions to liability, 28 U.S.C. 2680, bars a subsequent action by the claimant against the federal employees whose acts gave rise to the FTCA claim.

PARTIES TO THE PROCEEDING

Petitioners are Richard Will, Dennis P. Harrison, Margaret M. Jordan, Thomas Virgilio, and Robert C. Bonner.*

Respondents are Susan Hallock and Ferncliff Associates, Inc., d/b/a Multimedia Technology Center.

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* The court of appeals directed that Robert C. Bonner "should be dismissed from this action" because he did not hold office at the time of the events at issue in the litigation. App., *infra*, 2a n.1. Because the district court has not yet entered an order of dismissal, he joins in the petition as a protective matter. Additional John and Jane Doe defendants were named in the complaint, but no defendants other than those identified in the text as petitioners were served.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	7
I. The court of appeals' refusal to apply the Federal Tort Claims Act's judgment bar to a prior judgment based on an exception to the FTCA is contrary to Section 2676's plain text and the overall structure of the Act	7
A. The court of appeals erred by reading an implicit limitation into the unambiguous text of Section 2676	9
B. The court of appeals' purported distinction between subject matter jurisdiction and other grounds of judgment is without merit under the FTCA, in which questions of jurisdiction and the merits often merge	11
II. The court of appeals' decision warrants review by this Court	14
A. The court of appeals' decision squarely conflicts with decisions of the Seventh and Ninth Circuits	14
B. The court of appeals' decision is also contrary to decisions of this Court construing similarly worded provisions of the FTCA	16
C. The petition presents a recurring question of considerable importance regarding the personal liability of Federal employees for acts taken in the course of their employment	19
Conclusion	21

TABLE OF CONTENTS—Continued: Page

Appendix A 1a
Appendix B 18a
Appendix C 27a
Appendix D 41a
Appendix E 43a

TABLE OF AUTHORITIES

Cases:

Andrus v. *Glover Constr. Co.*, 446 U.S. 608 (1980) 17
Audio Odyssey, Ltd. v. *United States*, 255 F.3d 512 (8th Cir. 2001) 19
Bell v. *United States*, 127 F.3d 1226 (10th Cir. 1997) 20
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 4
Brown v. *United States*, 851 F.2d 615 (3d Cir. 1988) 5
Cohen v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) 5
Davric Maine Corp. v. *United States Postal Serv.*, 238 F.3d 58 (1st Cir. 2001) 19
Farmer v. *Perrill*, 275 F.3d 958 (10th Cir. 2001) 5, 8
FDIC v. *Meyer*, 510 U.S. 471 (1994) 17, 18
Franklin Sav. Corp. v. *United States*, 180 F.3d 1124 (10th Cir.), cert. denied, 528 U.S. 964 (1999) 19
Gasho v. *United States*, 39 F.3d 1420 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995) 8, 14, 15, 19
Gould Elecs., Inc. v. *United States*, 220 F.3d 169 (3d Cir. 2000) 13
Hartford Underwriters Ins. Co. v. *Union Planters Bank, N.A.*, 530 U.S. 1 (2000) 9
Hoosier Bancorp of Ind., Inc. v. *Rasmussen*, 90 F.3d 180 (7th Cir. 1996) 8, 14, 15
Hoosier Bancorp v. *United States*, No. IP94-1265-C-D/F (S.D. Ind. Feb. 17, 1995) 15

Cases—Continued: Page

Hughes Aircraft Co. v. *Jacobson*, 525 U.S. 432 (1999) 10
Hughes Aircraft Co. v. *United States ex rel. Schumer*, 520 U.S. 939 (1997) 12
Johnson v. *Smithsonian Inst.*, 189 F.3d 180 (2d Cir. 1999) 13
Makarova v. *United States*, 201 F.3d 110 (2d Cir. 2000) 13
Millares Guiraldes de Tineo v. *United States*, 137 F.3d 715 (2d Cir. 1998) 13
Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 5
Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) 12
Redmon v. *United States*, 934 F.2d 1151 (10th Cir. 1991) 20
Republic of Austria v. *Altmann*, 124 S. Ct. 2240 (2004) 12
Serra v. *Pichardo*, 786 F.2d 237 (6th Cir.), cert. denied, 479 U.S. 826 (1986) 17
Smith v. *Marshall*, 885 F.2d 650 (9th Cir. 1989) 16
United States v. *Kubrick*, 444 U.S. 111 (1979) 13
United States v. *Ron Pair Enters., Inc.*, 489 U.S. 235 (1989) 9
United States v. *Smith*, 499 U.S. 160 (1991) 16, 17

Constitution, statutes and rules:

U.S. Const. Amend. V (Due Process Clause) 4
Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4564 17
Federal Tort Claims Act:
28 U.S.C. 1346(b) 2, 3, 7, 9, 10, 13, 17, 18
28 U.S.C. 1346(b)(1) 2, 8, 11, 43a
28 U.S.C. 2401(b) 13
28 U.S.C. 2670-2680 2

Statutes and rules—Continued:	Page
28 U.S.C. 2671 *et seq.*	11
28 U.S.C. 2674	8, 11, 13
28 U.S.C. 2676	*passim*
28 U.S.C. 2679	16, 44a
28 U.S.C. 2679(a)	17, 18, 19, 44a
28 U.S.C. 2679(b)	16, 17, 44a
28 U.S.C. 2679(b)(2)(A)	17, 44a
28 U.S.C. 2680	8, 11, 12, 14, 16, 17, 19, 45a
28 U.S.C. 2680(a)	15, 45a
28 U.S.C. 2680(c)	3, 10, 13, 14, 15, 45a
Fed. R. Civ. P.:	
Rule 12(b)(1)	8, 11
Rule 12(b)(6)	8, 11
Rule 56	8

In the Supreme Court of the United States

No.

RICHARD WILL, ET AL., PETITIONERS

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SUSAN HALLOCK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the federal-officer petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 387 F.3d 147. The opinions of the district court (App., *infra*, 18a–26a, 27a-40a) are reported at 281 F. Supp. 2d 425 and 253 F. Supp. 2d 361.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 2004. An order denying a petition for rehearing was entered on January 4, 2005 (App., *infra*, 41a-42a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, are set out in an appendix to this petition. App., *infra*, 43a-46a.

STATEMENT

1. The FTCA's judgment bar protects federal employees from suit where the claimant has brought an action against the United States under 28 U.S.C. 1346(b) based on the same subject matter, and that action has already gone to judgment. The judgment bar provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676.

Section 1346(b) is the jurisdictional provision of the FTCA. It provides the district courts with "exclusive jurisdiction" over tort claims against the United States. Specifically, Section 1346(b) provides that, "[s]ubject to the provisions of chapter 171 of this title," the district courts "shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). Chapter 171 of Title 28 contains the various procedural and liability provisions of the FTCA, as well as the exceptions to the FTCA. See 28 U.S.C. 2670-2680.

2. In June 2000, federal officers seized several computers from respondents pursuant to a lawful warrant obtained in connection with a child-pornography investigation. App., *infra*, 28a. No criminal charges were filed against respondents, and the seized property was returned to them on December 21, 2000. *Id.* at 28a-29a & n.1.

3. In July 2002, respondents filed a complaint against the United States in the United States District Court for the Northern District of New York. In their complaint, respondents alleged that some of the computers seized in the Government's investigation were damaged while in the Government's custody, and that the resulting loss of personal and business records caused respondents to have to close their business. The sole basis for jurisdiction asserted in respondents' complaint against the United States was 28 U.S.C. 1346(b), the jurisdictional provision of the FTCA. App., *infra*, 27a. The complaint sought money damages against the United States for injury or loss to respondents' property caused by the negligent or wrongful acts of employees of the United States Customs Service and other governmental agencies while acting within the scope of their employment. *Id.* at 27a-28a, 29a-30a.

The United States moved to dismiss the claim based on the detention-of-goods exception to the FTCA. 28 U.S.C. 2680(c). That provision establishes an exception to the FTCA for "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." *Ibid.*

The district court granted the United States' motion to dismiss the FTCA action. App., *infra*, 27a-40a. The court held that 28 U.S.C. 2680(c) precluded respon-

dents' claims regardless of whether the seizure and detention of their goods was related to the collection of customs duties or to other law-enforcement purposes, and that the protection afforded by the exception is not limited to actions of officials of the Customs Service or Internal Revenue Service but rather extends to all law enforcement officers. App., *infra*, 32a-35a. The court rejected respondents' argument that the gravamen of their claims related to the "seizure" of the computers, rather than their "detention." *Id.* at 35a-38a. The court found, to the contrary, that respondents' claims for "negligent destruction of property, conversion, negligent bailment, larceny, misfeasance, and personal injury" all "arise 'out of the detention' of their property, and are thus precluded by § 2680(c)." *Id.* at 38a-40a. The district court entered a final judgment dismissing respondents' claims on March 24, 2003. Respondents did not appeal. *Id.* at 6a.

4. Seven months after filing their FTCA suit, respondents filed a second suit—the case presently before the Court—against petitioners, who are individual federal employees, for their alleged role in the seizure and detention of respondents' computers. Respondents allege a claim against the individual employees under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), on the theory that they intentionally deprived respondents of their intellectual property and business income in violation of respondents' rights under the Due Process Clause of the Fifth Amendment. C.A. App. A-16 to A-17.[1]

[1] Respondents' original complaint alleged only that the individual defendants had been negligent, but respondents amended their complaint to assert that the individual defendants had acted intentionally in damaging respondents' computers. See App., *infra*, 25a n.5.

Petitioners moved to dismiss the *Bivens* suit based on the FTCA's judgment bar, 28 U.S.C. 2676. The district court denied the motion. App., *infra*, 18a-26a. The court acknowledged petitioners' argument that 28 U.S.C. 2676 places no qualification on the term "judgment." App., *infra*, 23a (noting "the absence of qualifying language in the statute"). Nevertheless, the court construed Section 2676 as not applying where the prior FTCA judgment was based on one of the FTCA exceptions to the waiver of sovereign immunity. *Ibid.* Characterizing such a judgment as merely a "procedural loss" for the FTCA plaintiffs, the district court held that such a judgment "does not prevent them from pursuing enforcement of their substantive rights against the proper defendants." *Id.* at 24a.

5. Petitioners appealed, and the court of appeals affirmed the district court's conclusion that Section 2676 does not bar respondents' *Bivens* claim. App., *infra*, 1a-15a.[2] The court of appeals rejected the district

[2] The court of appeals held that an order denying a motion to dismiss on the basis of the FTCA's judgment bar is immediately appealable pursuant to the collateral order doctrine recognized in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). App., *infra*, 9a-10a. Although the court recognized that the Third Circuit had held that such orders were not immediately appealable, *id.* at 11a (citing *Brown* v. *United States*, 851 F.2d 615, 619 (3d Cir. 1988)), the Second Circuit reasoned that the judgment bar was intended to confer an immunity from suit, rather than simply a defense to liability, and that immediate appeal is therefore proper by analogy to qualified immunity decisions in *Bivens* suits. See *id.* at 10a (citing *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985)). See also *Farmer* v. *Perrill*, 275 F.3d 958, 961 (10th Cir. 2001) (holding denial of motion to dismiss on judgment bar grounds immediately appealable). The presence of this question of appellate jurisdiction

court's distinction between procedural and merits-based FTCA judgments. App., *infra*, 14a. The court nevertheless held that "an action brought under the FTCA and dismissed for lack of subject matter jurisdiction because it falls within an exception to the restricted waiver of sovereign immunity provided by the FTCA does not result in a 'judgment in an action under section 1346(b)'" that triggers the judgment bar. App., *infra*, 14a. The court reasoned that there was no judgment in respondents' prior case for purposes of Section 2676 because "the action was not *properly* brought *under* the Federal Tort Claims Act in the first place and is a nullity." *Ibid.* According to the court, "for the judgment bar to apply, the action must first be a proper one for consideration under the Federal Tort Claims Act. In other words, it must fit within the category of cases for which sovereign immunity has been waived. If it does not, then a judgment declaring a lack of subject matter jurisdiction denotes that sovereign immunity has not been waived and that the case is not justiciable in any event." *Ibid.*

District Judge Marrero, sitting by designation, concurred separately. App., *infra*, 15a-17a. He favored the district court's merits/procedural dichotomy over the court of appeals majority's analysis focusing on whether the basis for the prior judgment was a lack of subject-matter jurisdiction. *Id.* at 15a. Judge Marrero recognized, however, that both the approach of the district court and that of the court of appeals majority "read an implied term" into the statute. *Ibid.*

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does not detract from the appropriateness of this case for certiorari. To the contrary, the acknowledged circuit conflict on the issue itself warrants resolution by this Court.

6. The court of appeals denied the federal employees' petition for rehearing. App., *infra*, 41a-42a.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the scope of protection from suit afforded federal employees by the judgment bar in the Federal Tort Claims Act, 28 U.S.C. 2676. That statutory provision establishes a "complete bar" to "any action" against government employees in connection with acts that have been the subject of "an action under section 1346(b)" of the FTCA that has gone to "judgment." *Ibid.* The court of appeals' decision renders the judgment bar inapplicable even though it is undisputed that these respondents brought a prior suit pursuant to Section 1346(b) concerning the same subject matter and that a final judgment has been rendered in that suit. The court of appeals' holding is contrary to the plain language of Section 2676, creates a direct conflict among the courts of appeals, and cannot be reconciled with decisions of this Court interpreting two similarly worded provisions of the FTCA. Review by this Court is warranted to resolve those conflicts on an important and recurring issue.

I. THE COURT OF APPEALS' REFUSAL TO APPLY THE FEDERAL TORT CLAIMS ACT'S JUDGMENT BAR TO A PRIOR JUDGMENT BASED ON AN EXCEPTION TO THE FTCA IS CONTRARY TO SECTION 2676'S PLAIN TEXT AND THE OVERALL STRUCTURE OF THE ACT

The text of the FTCA's judgment bar is simple and direct, and there is no question that the express elements for its application are satisfied in this case. The statute provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a

complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. The term "[t]he judgment" is unqualified.

Thus, as the Second Circuit recognized (App., *infra*, 14a-15a), and as the other courts of appeals that have considered the question have unanimously concluded, a judgment under the FTCA triggers the judgment bar in a subsequent suit against federal employees on the same subject matter even when the FTCA judgment is adverse to the claimant. See *Farmer*, 275 F.3d at 963; *Hoosier Bancorp of Indiana, Inc.* v. *Rasmussen*, 90 F.3d 180, 184 (7th Cir. 1996); *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995). Section 2676 is a "judgment bar," not a "favorable judgment bar." As the Tenth Circuit has explained, "Section 2676 makes no distinction between favorable and unfavorable judgments—it simply refers to '[t]he judgment in an action under section 1346(b).'" *Farmer*, 275 F.3d at 963.

Furthermore, by the statute's plain text, the judgment bar applies where judgment is entered in favor of the government because the claim is found to fall within one of the FTCA's exceptions in Section 2680. The exceptions in Section 2680 limit *both* the jurisdiction of courts over FTCA actions, 28 U.S.C. 1346(b)(1), and the substantive liability of the United States, 28 U.S.C. 2674. It does not matter whether the exception was found to apply on a motion to dismiss for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1), on a motion to dismiss for failure to state a claim upon which relief could be granted under Rule 12(b)(6), on summary judgment under Rule 56, or after a trial. No matter what procedural device triggered the

judgment, the judgment bar applies. The court of appeals' decision engrafts onto the statutory language an additional requirement that is not found in its text—that the prior judgment rested on some ground other than lack of subject matter jurisdiction because of the applicability of one of the FTCA's exceptions. That was error, for "when 'the statute's language is plain, the sole function of the courts'—at least where the disposition required by the text is not absurd—'is to enforce it according to its terms.'" *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). There is no argument here that applying Section 2676 by its terms would be absurd. To the contrary, it is the court of appeals' modification of the text that renders its application unworkable.

A. The Court Of Appeals Erred By Reading An Implicit Limitation Into The Unambiguous Text Of Section 2676

The terms of Section 2676 as written are unquestionably satisfied here. It is clear that, absent the addition of unstated limitations, respondents' prior FTCA suit was "an action under section 1346(b)." There is no dispute that the sole basis asserted for the court's jurisdiction in respondents' suit against the United States was Section 1346(b) of the FTCA. See App., *infra*, 5a (noting that respondents' alleged loss "was the subject of a previous action brought by plaintiffs against the United States of America under the Federal Tort Claims Act ('FTCA'), 28 U.S.C. § 1346"); *id.* at 27a (stating that respondents "brought suit against defendant United States of America

('United States') pursuant to the Federal Tort Claims Act ('FTCA'), 28 U.S.C. § 1346").

It is also clear that the present action arises out of "the same subject matter" as the FTCA suit, and that "judgment" was entered in the earlier litigation. As reflected in the district court docket sheet in the FTCA action, a separate judgment was entered on March 24, 2003. The court of appeals likewise acknowledged that "[a] judgment of dismissal" was entered in respondents' FTCA action, and that "[n]o appeal was taken from that judgment." App., *infra*, 6a.

The court of appeals nonetheless resisted the conclusion that Section 2676 was satisfied and, instead, carved out an exception to Section 2676 where the prior FTCA "judgment declar[es] a lack of subject matter jurisdiction." App., *infra*, 14a. The court reasoned that because the prior district court judgment dismissed respondents' FTCA claims for lack of jurisdiction, on the ground that the claims fell within the detention-of-goods exception in 28 U.S.C. 2680(c), the prior suit "was not *properly* brought *under* the Federal Tort Claims Act in the first place and is a nullity." App., *infra*, 14a.

There was no justification for the court of appeals to engraft that additional requirement onto the statute. See *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) ("analysis begins with the language of the statute. * * * And where the statutory language provides a clear answer, it ends there as well.") (citation and internal quotation marks omitted). The prior judgment in respondents' action under Section 1346(b) establishes "a complete bar to any action" by respondents against the government employees whose conduct gave rise to the earlier FTCA action.

B. The Court Of Appeals' Purported Distinction Between Subject Matter Jurisdiction And Other Grounds Of Judgment Is Without Merit Under The FTCA, In Which Questions Of Jurisdiction And The Merits Often Merge

In addition to finding no support in the text of Section 2676, the court of appeals' distinction between judgments based on lack of subject matter jurisdiction and judgments on other grounds is inconsistent with the overall structure of the FTCA. For purposes of the FTCA, many defenses, including those set forth in Section 2680, can be stated in both jurisdictional and non-jurisdictional terms. There is no indication in the text of Section 2676 that its application should turn on the fortuity of whether the district court in the FTCA action characterized its judgment on such a ground as being entered under Federal Rule of Civil Procedure 12(b)(1), for lack of jurisdiction, or under Rule 12(b)(6), for failure to state a claim upon which relief can be granted.

In particular, the FTCA exceptions enumerated in Section 2680 serve both as limitations on the United States' waiver of its sovereign immunity and as substantive restrictions on the United States' liability under Section 2674. Section 1346(b)(1) waives the sovereign immunity of the United States for tort claims and grants the district courts jurisdiction over such claims, "[s]ubject to the provisions of chapter 171," *i.e.*, 28 U.S.C. 2671 *et seq.* The provisions of Sections 2671 *et seq.*, including the exceptions set forth in Section 2680, create and define the scope of the United States' substantive tort liability. Because those provisions are incorporated into Section 1346(b)(1), they are *also* conditions on the waiver of sovereign immunity and

limitations on the jurisdiction of the district court. Thus, Section 2680 provides that *neither* the "provisions of this chapter" (*i.e.*, the FTCA's procedural and substantive provisions) *nor* "section 1346(b) of this title" (the waiver of sovereign immunity and grant of jurisdiction) shall "apply" to claims falling within the exceptions.

The Court has recognized the substantive nature of limitations of this sort, even though phrased in jurisdictional terms. See *Republic of Austria* v. *Altmann*, 124 S. Ct. 2240 (2004). As the Court explained in *Altmann*, "[w]hen a 'jurisdictional' limitation adheres to the cause of action" by "prescrib[ing] a limitation that any court entertaining the cause of action [is] bound to apply," "the limitation is essentially substantive." *Id.* at 2251 n.15 (citing *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 951 (1997)). That description is particularly appropriate with respect to the limitations on the United States' liability expressed in Section 2680. Although they may be characterized in jurisdictional terms, they also "prescribe[] a limitation that any court entertaining the cause of action [is] bound to apply." *Ibid.*

The court of appeals' discussion of the statute of limitations underscores this point. As this Court has recognized, a dismissal on statute-of-limitations grounds is a "judgment on the merits" that is treated like a "dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995). Perhaps for that reason, the court of appeals recognized that a judgment dismissing an FTCA action on statute-of-limitations grounds *would* trigger the judgment bar. App., *infra*, 14a-15a. In the special context of the FTCA, however, restrictions on a plaintiff's

ability to sue the United States are also limitations on the United States' waiver of its sovereign immunity. See *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979). Thus, as the Second Circuit has elsewhere recognized, a dismissal on the basis of the FTCA's statute of limitations, 28 U.S.C. 2401(b), is also a dismissal for lack of jurisdiction. See *Johnson* v. *Smithsonian Inst.*, 189 F.3d 180, 189-190 (2d Cir. 1999); *Millares Guiraldes de Tineo* v. *United States*, 137 F.3d 715, 719-720 (2d Cir. 1998). The court of appeals' failure to explain why a dismissal for lack of jurisdiction based on statute-of-limitations grounds should trigger the judgment bar, while a judgment under Section 2680(c) does not, suggests that the court misunderstood the close interrelationship between jurisdictional and non-jurisdictional bases for judgment under the FTCA.[3]

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[3] Indeed, under the FTCA, even a finding that the plaintiff's claim fails to satisfy the substantive elements of a state law cause of action could be treated as a dismissal for lack of jurisdiction. Section 1346(b) grants jurisdiction only to the extent that "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." That jurisdictional limitation is nearly identical to the provision defining the scope of the United States' liability under the FTCA, which provides that "[t]he United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. Accordingly, a defense that a private person could not be held liable under state law might form a basis for judgment in the government's favor either on the merits (Section 2674) or for lack of jurisdiction (Section 1346(b)). See *Makarova* v. *United States*, 201 F.3d 110, 116 (2d Cir. 2000) (affirming "dismissal for lack of subject matter jurisdiction" because plaintiff "could not have brought suit against a private employer in Washington, D.C.," which made workers' compensation an exclusive remedy); *Gould Elecs., Inc.* v. *United States*, 220 F.3d 169, 192 (3d Cir. 2000) (holding that the district court "lacked subject matter jurisdiction over the indemnity claim"

As the foregoing demonstrates, the Second Circuit's purported distinction between jurisdictional and non-jurisdictional dismissals is without support not only in the text of Section 2676, but also is at odds with the entire structure of the FTCA.

II. THE COURT OF APPEALS' DECISION WARRANTS REVIEW BY THIS COURT

A. The Court of Appeals' Decision Squarely Conflicts with Decisions of The Seventh and Ninth Circuits

The court of appeals' decision is in direct conflict with the decisions of the two other circuits that have considered the precise question presented here. The Seventh and Ninth Circuits have each held that the judgment bar applies where the prior FTCA judgment was based on a determination that the action was precluded by one of the FTCA exceptions in 28 U.S.C. 2680. See *Hoosier Bancorp of Indiana, Inc.* v. *Rasmussen*, 90 F.3d 180, 184 (7th Cir. 1996); *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995). In *Gasho*, the Ninth Circuit held that a *Bivens* action was properly dismissed under the judgment bar on the basis of a prior FTCA judgment granting summary judgment to the United States on the ground that the plaintiffs' claims were barred by the detention-of-goods exception in Section 2680(c). 39 F.3d at 1433-1434, 1436, 1437-1438. That is the same FTCA exception that formed the ground for the FTCA judgment on which petitioners rely here. Similarly, in *Hoosier Bancorp*, the Seventh Circuit held that a *Bivens* action was properly

because "the United States would not be liable" under the law of the relevant jurisdictions).

dismissed under the judgment bar on the basis of a prior FTCA judgment dismissing the plaintiffs' claims for lack of subject matter jurisdiction in light of the discretionary function exception in Section 2680(a). See 90 F.3d at 184-185, aff'g *Hoosier Bancorp* v. *United States*, No. IP94-1265-C-D/F (S.D. Ind. Feb. 17, 1995).[4] Both the Seventh and Ninth Circuits relied on the broad, unconditional language of Section 2676 to conclude that "*any* FTCA judgment, regardless of its outcome, bars a subsequent *Bivens* action on the same conduct that was at issue in the prior judgment." *Id.* at 185 (quoting *Gasho*, 39 F.3d at 1437).

The court of appeals in this case distinguished *Gasho* "as a case decided on the merits." App., *infra*, 13a. But that purported distinction only underscores the extent to which the Second Circuit's mistaken version of the judgment bar would turn on procedural fortuities. As noted above, the FTCA action at issue in *Gasho* was barred by the detention-of-goods exception in 28 U.S.C. 2680(c), precisely the same basis of the prior FTCA judgment in this case. Thus, it appears that the court of appeals sought to distinguish *Gasho* on the ground that, in that case, the decision holding that Section 2680(c) foreclosed the plaintiffs' claims was reached at the summary judgment stage, 39 F.3d at 1432, whereas the FTCA decisions in *Hoosier Bancorp* and this case were reached on motions to dismiss for lack of jurisdiction, C.A. App. A-51; App., *infra*, 29a. As previously discussed, see pp. 11-14, *supra*, there is no basis for making such distinctions among judgments for purposes of the judgment bar.

[4] The district court's decision in *Hoosier Bancorp* can be found at C.A. App. A-50 to A-68.

B. The Court Of Appeals' Decision Is Also Contrary To Decisions Of This Court Construing Similarly Worded Provisions Of The FTCA

The Second Circuit's interpretation of the phrase "under section 1346(b)" in Section 2676 to include only those cases that are not subject to one of the defenses provided elsewhere in the FTCA also cannot be reconciled with decisions of this Court and other courts of appeals construing the similarly worded exclusivity provisions of Section 2679 of the FTCA.

1. Section 2679(b) states that "[t]he remedy against the United States provided by sections 1346(b) and 2672 of this title" is exclusive and bars a claim against the employee whose conduct is at issue, except for claims based on the Constitution or a federal statute that provides a cause of action against the employee as an individual. In *United States* v. *Smith*, 499 U.S. 160 (1991), this Court rejected a construction of the phrase "provided by sections 1346(b) and 2672" in Section 2679 that was nearly identical to the reading of the phrase "under section 1346(b)" in Section 2676 that the court of appeals adopted here. The Ninth Circuit had held that Section 2679(b)'s exclusive remedy provision applied only if the FTCA would provide the plaintiff a remedy once the United States was substituted as the defendant. *Smith* v. *Marshall*, 885 F.2d 650, 654-656 (9th Cir. 1989). This Court reversed, holding that Section 2679(b) bars suit against an individual officer even if, as a result of one of Section 2680's exceptions, "the FTCA itself does not provide a means of recovery." 499 U.S. at 166.

The court of appeals' decision in this case cannot be reconciled with this Court's interpretation of Section 2679(b). Just as the phrase "[t]he remedy * * * provided by sections 1346(b) and 2672" in Section 2679(b)

includes cases in which the claim, though otherwise proper under Section 1346(b), is barred by Section 2680, so too the phrase "an action under section 1346(b)" in the FTCA's judgment bar, 28 U.S.C. 2676, must include a case brought under Section 1346(b) that is later held to be barred by a Section 2680 exception.[5]

2. The FTCA's other exclusivity provision—Section 2679(a)—makes the FTCA the exclusive avenue for tort claims against the government, even against agencies that may otherwise "sue and be sued" in their own names. See *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994). Section 2679(a) provides:

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are *cognizable under section 1346(b)* of

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[5] *Smith* also refutes any contention that Section 2679(b)(2)(A)'s exception for constitutional claims suggests that *Bivens* claims should be excepted from the judgment bar. When Congress excepted *Bivens* claims from Section 2679(b) in 1988, see Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4564, it demonstrated that it was aware that the Act otherwise would have affected the availability of *Bivens* claims. But Congress did not provide a similar exception to the FTCA's judgment bar. Rather, Congress left Section 2676 intact, even though courts had been applying it to *Bivens* claims. See, *e.g.*, *Serra* v. *Pichardo*, 786 F.2d 237 (6th Cir.), cert. denied, 479 U.S. 826 (1986). As *Smith* notes, the exception for *Bivens* claims in Section 2679(b) shows that Congress knows how to preserve the liability of federal employees when it wants to do so, and thus that inferring additional exceptions in Section 2676 is unwarranted. See 499 U.S. at 166-167 (citing *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.")).

this title, and the remedies provided by this title in such cases shall be exclusive.

28 U.S.C. 2679(a) (emphasis added).

In *Meyer*, the Court stated that a claim is "cognizable under section 1346(b)" if it is within the category of claims defined by Section 1346(b), which include "claims that are '[1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.'" 510 U.S. at 477 (quoting 28 U.S.C. 1346(b)). The Court explained that a claim "comes within this jurisdictional grant—and thus is 'cognizable' under § 1346(b)—if it is actionable under § 1346(b). And a claim is actionable under § 1346(b) if it alleges the six elements outlined above." *Ibid.* Indeed, the Court emphasized that "[t]he question is not whether a claim is cognizable *under the FTCA* generally * * * but rather whether it is 'cognizable *under section 1346(b)*.'" *Id.* at 477 n.5 (quoting 28 U.S.C. 2679(a)). The court of appeals' holding makes the very mistake the Court warned against in *Meyer*. The court of appeals rewrote the phrase "under section 1346(b)," 28 U.S.C. 2676, as "*properly* brought *under* the Federal Tort Claims Act" generally. App., *infra*, 14a.

Applying *Meyer*, several courts of appeals have recognized that a claim is "cognizable under section 1346(b)," and thus precludes suit against the agency directly, so long as the claim arises under state law, even if the FTCA as a whole provides no remedy due to

one or more of the exceptions in Section 2680. See *Audio Odyssey, Ltd.* v. *United States*, 255 F.3d 512, 522 (8th Cir. 2001); *Davric Maine Corp.* v. *United States Postal Serv.*, 238 F.3d 58, 61-64 (1st Cir. 2001); *Franklin Sav. Corp.* v. *United States*, 180 F.3d 1124, 1142-1143 (10th Cir.), cert. denied, 528 U.S. 964 (1999). Those decisions make clear that under Section 2679(a), a suit is an action "cognizable under section 1346(b)" so long as it asserts a tort claim against the United States premised upon state law, even if that claim is ultimately barred by one of the exceptions to suit provided in Section 2680.

The court of appeals made no effort to harmonize its construction of the phrase "under section 1346(b)" for purposes of 28 U.S.C. 2676, and the established meaning of the phrase "cognizable under section 1346(b)" in 28 U.S.C. 2679(a). And there is no apparent basis in the text for treating the two phrases so differently.

C. The Petition Presents A Recurring Question Of Considerable Importance Regarding The Personal Liability Of Federal Employees For Acts Taken In The Course Of Their Employment

This Court's review is warranted to resolve the conflicts with decisions of this Court and other courts of appeals identified above, and because the court of appeals' decision will otherwise undermine the purposes the judgment bar was intended to serve. The judgment bar reflects Congress's recognition that successive litigation of related claims imposes considerable burdens on the government, as well as federal employees subject to suit for acts taken within the scope of their employment. See *Gasho*, 39 F.3d at 1437 ("Congress * * * was concerned about the [G]overnment's ability to marshal the manpower and finances to

defend subsequent suits against its employees."). The decision of the court of appeals significantly reduces the effectiveness of the judgment bar, by carving out an exception for jurisdictional dismissals. Because of the "jurisdictional" nature of so many of the Government's defenses under the FTCA, that would deprive a very large number of FTCA judgments of their preclusive effect.

Indeed, even cases that have consumed considerable governmental resources, such as cases that have gone to summary judgment or trial on defenses such as the discretionary function exception, see, *e.g.*, *Bell* v. *United States*, 127 F.3d 1226, 1228 (10th Cir. 1997) (quoting *Redmon* v. *United States*, 934 F.2d 1151, 1155 (10th Cir. 1991) (holding that, because FTCA's discretionary function exception "involves both jurisdictional and merits issues," it should be decided on summary judgment, rather than motion to dismiss (citation omitted)), might, under a rule based upon a jurisdictional/non-jurisdictional distinction, be considered a "nullity" for purposes of the judgment bar. App., *infra*, 14a. The only alternative would be to have the application of the judgment bar turn solely on the stage of the proceedings or the caption of the dispositive motion. None of those rules can be reconciled with either the text or the purposes of Section 2676. This Court should grant review to correct the court of appeals' erroneous limitation of this important federal statute.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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APRIL 2005

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 03-6221

SUSAN HALLOCK, FERNCLIFF ASSOCIATES, INC., DOING BUSINESS AS MULTIMEDIA TECHNOLOGY CENTER, PLAINTIFFS-APPELLEES

v.

ROBERT C. BONNER, RICHARD WILL, DENNIS P. HARRISON, MARGARET M. JORDAN, THOMAS VIRGILIO, UNKNOWN NAMED AGENTS OF UNITED STATES CUSTOMS AND TREASURY, UNKNOWN NAMED AGENTS OF UNITED STATES DEPARTMENT OF JUSTICE, UNKNOWN NAMED AGENTS OF UNITED STATES POSTAL SERVICE, UNKNOWN NAMED AGENTS OF UNITED STATES MARSHALS SERVICE, JOHN & JANE DOES 1-25, DEFENDANTS-APPELLANTS

Argued: June 7, 2004
Decided: Oct. 22, 2004

Before: MINER and RAGGI, Circuit Judges, and MARRERO, District Judge.*

Judge MARRERO concurs in the majority opinion and in a separate concurring opinion.

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* The Honorable Victor Marrero, of the United States District Court for the Southern District of New York, sitting by designation.

MINER, Circuit Judge.

In this action, defendants-appellants, Robert C. Bonner,[1] Richard Will, Dennis P. Harrison, Margaret M. Jordan, and Thomas Virgilio, all employees of the United States Customs Service, sued along with other, "unknown named" agents of the United States Customs Service, the United States Department of the Treasury, the United States Justice Department, and the United States Marshals Service (collectively, the "defendants"), appeal from an order entered in the United States District Court for the Northern District of New York (Hurd, *J.*). The action was brought by plaintiffs-appellees, Susan Hallock and Femcliff [*sic*] Associates, Inc., d/b/a Multimedia Technology Center (collectively, the "plaintiffs"), under the authority of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) [hereinafter "*Bivens*"], for damages arising from the seizure of plaintiffs' computer equipment in violation of the Fifth Amendment of the United States Constitution.

The same plaintiffs had invoked the Federal Tort Claims Act in a previous action brought against the United States to recover for the same wrongful acts. That action was concluded by a judgment of dismissal for lack of subject matter jurisdiction. The defendants' assertion of that judgment as a bar to the present

[1] It appears that Robert C. Bonner, Commissioner of Customs and Border Protection, did not hold office at the time of the events that form the subject of this lawsuit. Since he did not have direct involvement in these events, he should be dismissed from this action. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001).

action was the basis for the motion that culminated in the order giving rise to this appeal. Rejecting the contention that this appeal is taken from a non-appealable interlocutory order, we affirm the determination of the District Court for reasons somewhat different from those given by that court.

BACKGROUND

The background of this case, at least for present purposes, is framed by the allegations of the complaint. Those allegations must be accepted as true at this stage of the litigation because defendants have moved for judgment on the pleadings. *See Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001). Accordingly, the background facts that follow are taken from the complaint.

Plaintiff Susan Hallock, who resides with her husband, Richard Hallock, at 194 Ferncliff Road in the Village of Mohawk, Herkimer County, New York, is president and sole stockholder of Ferncliff Associates, Inc., d/b/a Multimedia Technology Center ("Ferncliff"). The corporate address is the same as the home address of the Hallocks. On June 8, 2000, defendants Jordan, Virgilio, and Harrison, along with others, executed at 194 Ferncliff Road a search warrant issued by the United States District Court for the Northern District of New York. The warrant authorized seizure of "all property, contraband, instrumentalities, fruits[,] or evidence of violation of Title 18, United States Code, § 2252 and § 2252A." The cited statutes proscribe activities relating to material involving the sexual exploitation of minors and activities relating to material constituting or containing child pornography.

Pursuant to the search warrant, defendants seized all computer equipment, software data, and hard disk drives located at the Ferncliff Road location. Because of the nature of the data stored on the hard disk drives, the seizure included "all Computer Software Intellectual Property, all [C]omputerized Proprietary Computer Software Design Documents, all Computerized Personal Records, all Computerized Business Records, all Computerized Accounts, Client Files and Business as well as Technological Trade Secrets belonging to Plaintiffs, both primary and archival backups."

Apparently, Richard Hallock was the victim of identity theft, and no evidence of any violation of the cited statutes was found in the materials seized. In any event, no charge of any kind was filed against Richard or Susan Hallock, and the items seized, or what was left of them, were returned to the plaintiffs on December 21, 2000. Proposed agreements acknowledging the receipt of the seized items were presented to the plaintiffs by the United States Attorney for the Northern District of New York. The proposed agreements included a representation by Richard Hallock that the data images in the computers returned were "complete and accurate reproduction[s]" and had "not been altered." The agreements also included a clause whereby Richard Hallock would agree to save harmless the Customs Service, Treasury and Justice Departments, and their agents from any claims relating to the seizure and detention of plaintiffs' property. It appears that Richard Hallock did not execute the proposed agreements.

When Richard Hallock received the computer equipment and hard disk drives on December 21, after the items had been in the custody of the defendants since

June 8, he examined the equipment and observed that four of the nine computer systems seized were totally unusable. One of the four was returned to its owner, a client of Ferncliff Associates, Inc., and the loss of the other three resulted in the termination of the plaintiffs' business operations. It also was discovered that five of the hard disk drives seized were so damaged that all stored data were lost. Data previously described as included in the seizure—including documents, records, accounts, files, and trade secrets—had been stored on the hard drives.

In the complaint that we examine on this appeal, plaintiffs allege that "[d]efendants intentionally caused total and permanent damage to the computer equipment resulting in the complete loss of all stored computer data as well as loss of computer equipment, all critical to the continued business operations of [p]laintiffs." Asserting a violation of the Fifth Amendment, plaintiffs seek damages in excess of $4.4 million. The alleged loss and destruction of the plaintiffs' computer equipment was the subject of a previous action brought by plaintiffs against the United States of America under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, and dismissed for lack of subject matter jurisdiction. *See Hallock v. United States*, 253 F. Supp. 2d 361 (N.D.N.Y. 2003) [hereinafter "*Hallock I*"].

In *Hallock I*, the District Court was confronted with a complaint in which the plaintiffs put forth claims of negligent destruction of property, conversion, negligent bailment, larceny, misfeasance, and personal injury. The FTCA waives the sovereign immunity of the United States to allow civil actions

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

There are various exceptions to this waiver of sovereign immunity, and it is the following exception, set forth in 28 U.S.C. § 2680(c), which the District Court was constrained to apply in *Hallock I:* "Any claim arising in respect of . . . the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer . . . ." *Hallock I,* 253 F. Supp.2d at 365 (quoting 28 U.S.C. § 2680(c)) (emphasis removed). Rejecting arguments that the exception applies only to officers performing tax or custom duties and that plaintiffs' claims arose from the seizure rather than the detention of goods, the court in *Hallock I* granted the motion to dismiss the amended complaint in accordance with the Government's motion filed pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). In its memorandum-decision and order dated March 21, 2003, the District Court concluded as follows: "Pursuant to § 2680(c), plaintiffs are precluded from pursuing their claims under the Federal Tort Claims Act. All of plaintiffs' claims arise out of the detention of their property by agents of the United States, and are therefore barred." 253 F. Supp. 2d at 368. A judgment of dismissal was entered shortly thereafter. No appeal was taken from that judgment.

The *Bivens* action subject of the instant appeal was commenced while the Government's motion to dismiss in *Hallock I* was pending. Here, the plaintiffs joined as defendants all the government agents and employees alleged to have been involved in the seizure and detention of plaintiffs' property. Defendants' motion for judgment on the pleadings, culminating in *Hallock v. Bonner*, 281 F. Supp. 2d 425 (N.D.N.Y. 2003) [hereinafter "*Hallock II* "], centered on the judgment-bar rule found at 28 U.S.C. § 2676. That statute provides that "[t]he judgment in an action under [the FTCA] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim." *Hallock II*, 281 F. Supp. 2d at 426 (internal quotation marks omitted).

In its memorandum-decision and order dated August 19, 2003 in *Hallock II* denying judgment on the pleadings, the District Court found a difference between various cases cited for the proposition that any FTCA judgment precludes a later *Bivens* action under the judgment-bar rule and the case at hand, where the *Bivens* action was brought after the filing of an FTCA action that was dismissed for lack of subject matter jurisdiction. *Id.* at 427. Noting defendants' argument "that there is no limit to the judgment bar and that the moment any judgment is entered on an FTCA claim a *Bivens* claims is precluded," the District Court opined that "[t]his broad reading would have the practical effect of foreclosing the enforcement of substantive rights for no other reason than the commission of an earlier procedural error." *Id.* Rejecting such a "broad reading," the District Court in *Hallock II* concluded that "plaintiffs' earlier procedural loss [did] not prevent

them from pursuing enforcement of their substantive rights against the proper defendants." *Id.* at 428.

By order dated October 6, 2003, the District Court denied the defendants' application to certify for appeal, pursuant to 28 U.S.C. § 1292(b), its order of August 19. The District Court found no controlling question of law involving a substantial basis for difference of opinion, a requirement for such certification. The rationale for that finding went as follows: "Defendants have failed to cite even one case—Circuit or District Court—in which a prior FTCA judgment dismissing a complaint for lack of subject matter jurisdiction would bar a subsequent *Bivens* action." The District Court added that its finding "would not, of course, bar an appeal as of right under the collateral order doctrine, if it is applicable."

This timely appeal, taken by the defendants from the order denying judgment on the pleadings, followed the denial of certification.

DISCUSSION

I. *Of Appealability*

We first address plaintiffs' argument that the order appealed from is interlocutory and non-final and, therefore, not appealable in accordance with the statutory provision conferring upon this Court "jurisdiction of appeals from all final decisions of District Courts." 28 U.S.C. § 1291. Generally, a final order is an order of the district court that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978) (internal quotation marks omitted). Clearly, the order under examination here is not such an order.

There are some narrowly drawn exceptions to the finality requirement, however. These exceptions allow an appeal to be taken from an interlocutory order where: (1) the order relates to injunctions, receiverships, and certain admiralty matters, 28 U.S.C. § 1292(a); (2) the district court has certified for immediate appeal an order (i) that involves a controlling question of law, (ii) as to which there exists a substantial ground for difference of opinion, and (iii) the disposition of which may materially advance the ultimate termination of the litigation, 28 U.S.C. § 1292(b); and (3) the order of the district court expressly directs the entry of a partial judgment in a multi-claim or multi-party action upon a determination that there is no just reason for delay. Fed. R. Civ. P. 54(b); *see Kahn v. Chase Manhattan Bank, N.A.*, 91 F.3d 385 (2d Cir. 1996). Here, the order under review does not fit within any of these three exceptions to the rule of finality.

There is yet a fourth exception to the rule of finality. It is the so-called "collateral order doctrine" that had its genesis in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949). In *Cohen*, a stockholder's derivative action was founded on diversity of citizenship. The defendant corporation sought to apply a state statute that required certain plaintiffs in such actions to post a bond as security for court costs. The district court order there in question held that the statute was not applicable to the plaintiffs. Holding that order appealable, the Supreme Court wrote: "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to

require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546, 69 S. Ct. 1221.

The collateral order doctrine is said to provide "a narrow exception to the general rule that interlocutory orders are not appealable as a matter of right." *Schwartz v. City of New York*, 57 F.3d 236, 237 (2d Cir.1995). "To fit within the collateral order exception, the interlocutory order must '[i] conclusively determine the disputed question, [ii] resolve an important issue completely separate from the merits of the action, and [iii] be effectively unreviewable on appeal from a final judgment.' "*Whiting v. Lacara*, 187 F.3d 317, 320 (2d Cir.1999) (allowing an appeal from a denial of an attorney's motion to withdraw as counsel) (quoting *Coopers & Lybrand v. Livesay*, U.S. at 468, 98 S. Ct. 2454).

We conclude that the order under review falls within the collateral order exception. First, there is no question that the order constitutes a conclusive determination of the disputed issue, viz. whether the judgment bar prescribed by Section 2676 derails the *Bivens* action at bar. Second, that issue is completely separate and distinct from the merits of the action, which pertain to the liability of the individual defendants, as agents of the Government, for their acts and omissions in regard to the detention of the plaintiffs' goods. Finally, the order is one that will not be *effectively* reviewable on appeal from a final judgment.

The reason that the order will be effectively unreviewable after final judgment is that Section 2676, which the order addresses, confers statutory immunity from suit. As in the case of qualified immunity, the immunity claimed by the defendants here provides an

"entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L. Ed. 2d 411 (1985). In short, " 'the essence' of the claimed right is a right not to stand trial," *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524, 108 S.Ct. 1945, 100 L. Ed.2d 517 (1988), and an order adjudicating that right is therefore effectively unreviewable on appeal, *see Murphy v. Reid*, 332 F.3d 82, 84 (2d Cir. 2003).

While no case in this Circuit is directly on point, the Tenth Circuit, in a factually analogous context, determined that "all three prongs of the collateral order doctrine [had been] plainly satisfied by the district court's holding that Section 2676 [did] not bar [plaintiffs'] *Bivens* claim." *Farmer v. Perrill*, 275 F.3d 958, 961 (10th Cir. 2001). We stand with the Tenth Circuit in that determination. To the extent that *Brown v. United States*, 851 F.2d 615, 619 (3d Cir. 1988), is to the contrary, based on the determination that the denial of a Section 2676 judgment bar is not unreviewable on appeal, we reject it. We also reject plaintiffs' contention that the order here is not appealable under the collateral order doctrine because it does not "present a question that is substantial, i.e., not doomed to failure under controlling precedent." *Lawson v. Abrams*, 863 F.2d 260, 262 (2d Cir. 1988). The "doomed to failure" language applies only to an argument that has been considered and rejected in a prior case. Here, the application of the judgment bar to the dismissal of an FTCA claim by virtue of a statutory exception is a matter of first impression in this Circuit and, therefore, cannot be described as "doomed to failure" in either this Court or the District Court.

II. *Of the Judgment Bar Provision*

The FTCA provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676. The bar was intended to prevent dual recovery from both the Government and its employees and to avoid the waste of Government resources in defending repetitive suits. *See Gasho* v. *United States*, 39 F.3d 1420, 1437-38 (9th Cir. 1994). Moreover, "[s]ince a judgment in an action against the United States under the FTCA will constitute a [judgment bar] in favor of the employee whose act gave rise to the claim," the rule increases the likelihood "that claims for torts [will] be made against the United States rather than, as *Bivens* suits, against the employee." *Birnbaum v. United States*, 588 F.2d 319, 333 (2d Cir. 1978). And "[t]hat is as it should be." *Id.* A Government agent should not "be made to suffer alone an ignominious financial ruin." *Id.* Indeed, "[c]ompensation for incidental harm resulting from the Government's pursuit of its . . . interests is more justly borne by the entire body politic than by agents of the Government[ ] who, out of [excess] zeal, exceeded the outer limits of their delegated authority." *Id.*

In addition, "Congress . . . was concerned about the [G]overnment's ability to marshal the manpower and finances to defend subsequent suits against its employees." *See Gasho*, 39 F.3d at 1437 (noting that "[t]he prevention of dual recovery . . . is not the only purpose of the statute"). At the Congressional hearings on the statute, "[o]ne witness testified that multiple suits imposed a 'very substantial burden' on the [G]overn-

ment." *Id.* (quoting Hearings Before the House Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. 90 (1942)). Moreover, included in the legislative history is a statement that "'[i]t is just and desirable that the burden of redressing wrongs of this character be assumed by the Government alone within limits, leaving the employee at fault to be dealt with under the usual disciplinary controls.'" *Gilman v. United States*, 206 F.2d 846, 848 n. 3 (9th Cir. 1953) (quoting S. Rep. No. 1196, at 5 (1942) (statement of Francis Shea, Assistant Attorney General)).

In reaching its conclusion that Section 2676 did not apply in the present context, the District Court drew a distinction between cases in which claims are dismissed for a "procedural error" (as the court characterized a dismissal for lack of subject matter jurisdiction under the FTCA) and cases in which claims are dismissed on the merits. *See Hallock II*, 281 F. Supp.2d at 427 (citing, e.g., *Gasho*, 39 F.3d at 1436 (determination on summary judgment), and *Farmer*, 275 F.3d at 962 (dismissal pursuant to Fed. R. Civ. P. 41(b))); *see also Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989) (FTCA claims determined pursuant to a bench trial); *Arevalo v. Woods*, 811 F.2d 487, 488 (9th Cir. 1987) (same); *Serra v. Pichardo*, 786 F.2d 237, 239 (6th Cir. 1986) (FTCA claims determined in a jury trial). Although the Government cites *Gasho* for the proposition that Section 2676 "speaks of 'judgment' and suggests no distinction between judgments favorable and judgments unfavorable to the Government," 39 F.3d at 1437, the District Court was correct to cite *Gasho* as a case decided on the merits.

In *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180 (7th Cir. 1996), however, the Seventh

Circuit affirmed the district court's decision applying Section 2676 to bar a *Bivens* claim on the basis of a prior judgment dismissing an FTCA claim for lack of subject matter jurisdiction. The Circuit Court "join[ed] the conclusion that *any* FTCA judgment, regardless of its outcome, bars a subsequent *Bivens* action on the same conduct that was at issue in the prior judgment." *Id.* at 185 (internal quotation marks omitted). We do not stand with the Seventh Circuit in its analysis of the issue before us, nor do we adopt the District Court's characterization of the dismissal of plaintiffs' FTCA claim for lack of subject matter jurisdiction as a "procedural loss." *Hallock II*, 281 F. Supp. 2d at 428 ("[P]laintiffs' earlier procedural loss does not prevent them from pursuing enforcement of their substantive rights against the proper defendants.").

As we see it, an action brought under the FTCA and dismissed for lack of subject matter jurisdiction because it falls within an exception to the restricted waiver of sovereign immunity provided by the FTCA does not result in a "judgment in an action under section 1346(b) [the Federal Tort Claims Act]." 28 U.S.C. § 2676. This is so because the action was not *properly* brought *under* the Federal Tort Claims Act in the first place and is a nullity. We hold that for the judgment bar to apply, the action must first be a proper one for consideration under the Federal Tort Claims Act. In other words, it must fit within the category of cases for which sovereign immunity has been waived. If it does not, then a judgment declaring a lack of subject matter jurisdiction denotes that sovereign immunity has not been waived and that the case is not justiciable in any event.

We reject the District Court's approach because any number of *procedural* defects and/or reasons having nothing to do with the merits of the claim may justify dismissal of an action properly brought under the Federal Tort Claims Act. For example, in an action *properly* pleaded under the FTCA, a judgment of dismissal based on the statute of limitations, laches, release, res judicata, or improper venue will justify the assertion of the judgment bar in a subsequent *Bivens* action. Indeed, even where an involuntary dismissal without prejudice is ordered pursuant to Fed. R. Civ. P. 41(b), the judgment entered thereon will constitute a complete bar if the action was one properly invoking jurisdiction under the FTCA. *Cf. Farmer*, 275 F.3d at 963-64.

CONCLUSION

The order of the District Court is affirmed for the foregoing reasons.

MARRERO, United States District Judge, concurring.

I concur in the holding of the majority opinion, but write separately to offer alternative grounds for affirmance that I find more compelling. I would affirm based on the reasoning of the District Court that a procedurally-based, rather than merits-based, ruling against a plaintiff on an FTCA claim does not trigger 28 U.S.C. § 2676's bar against a subsequent *Bivens* action.

The majority opinion states that a dismissal for lack of subject matter jurisdiction of a claim brought under the FTCA does not bar a later *Bivens* suit because such a claim "was not *properly* brought *under*" the FTCA and therefore is a "nullity." (*See supra* at 155, emphasis

in original.) The majority also writes that many types of procedural dismissals of FTCA claims may validly bar subsequent *Bivens* claims.

Both the majority's reasoning and the alternative approach I propose read an implied term into § 2676 to give the statute reasonable meaning; we merely choose to rely upon different words. The majority's construction finds, before the word "under," an implicit requirement that an action be "properly brought." Like the District Court in this case and in two other precedents cited below, the implied term under the alternative approach would interpret a requirement of "on the merits" after the word "judgment" in § 2676.

As the majority opinion correctly notes, the principal purposes of § 2676 are to prevent double recovery by a plaintiff from the Government and individual employees, and to avoid duplicative litigation. A *Bivens* action brought after a dismissal for lack of subject matter jurisdiction against an FTCA plaintiff does not present such dangers,[1] but neither do most other procedurally-based dismissals of FTCA claims. The majority concludes that certain procedurally-based dismissals of FTCA claims may legitimately bar subsequent *Bivens* actions, presumably under § 2676, but that dismissals for lack of subject matter jurisdiction do not. But prohibiting a subsequent *Bivens* action because a plaintiff's earlier FTCA claim was dismissed by reason of, for instance, improper venue or laches, would work an unduly harsh result on that plaintiff. Moreover, to cite another example, one could argue that an FTCA claim brought after the expiration of the relevant statute of limitations would be likewise "improperly brought" under the FTCA and should not bar a subsequent *Bivens* suit otherwise timely filed.

[1] At most, such a ruling imposes some additional litigation burdens on the Government.

Significantly, there is no requirement that a *Bivens* plaintiff also bring an FTCA claim. Dismissing a *Bivens* suit because of a good-faith procedural error in a plaintiff's litigation of an earlier FTCA action—an action that the plaintiff need not have brought at all to maintain a *Bivens* claim—does not advance Congress's goals in enacting § 2676 and unduly penalizes that plaintiff. To take an extreme example, if a plaintiff brings a *Bivens* action and an FTCA claim together in the same lawsuit and early in the litigation a court were to dismiss the FTCA claim on procedural grounds such as lack of proper venue, and not for lack of subject matter jurisdiction, the majority's analysis here would apparently accept the application of § 2676 to that plaintiff's *Bivens* suit. Under the alternative reading I would apply, such a bar would not require blanket dismissals in every such situation.

I have found only one other district court other than the District Court in this case that has apparently considered the precise question before this Court, and that court likewise ruled in two different opinions that the judgment bar in § 2676 does not block a *Bivens* suit when a prior FTCA claim was dismissed on procedural grounds. *See Michalik v. Hermann*, 2002 WL 31844910 (E. D. La. Dec. 16, 2002); *Michalik v. Hermann*, 2002 WL 1870054 (E. D. La. Aug. 12, 2002). Thus, while I join the judgment of this Court affirming the decision of the District Court, I would do so for the reasons stated above and to be consistent with the rulings of the only two other courts that have squarely considered this issue.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

No. 5:03-CV-195

SUSAN HALLOCK AND FERNCLIFF ASSOCIATES, INC., DBA MULTIMEDIA TECHNOLOGY CENTER, PLAINTIFFS

v.

ROBERT C. BONNER; RICHARD WILL; DENNIS P. HARRISON; MARGARET M. JORDAN; THOMAS VIRGILIO; UNKNOWN NAMED AGENTS OF UNITED STATES CUSTOMS AND TREASURY; UNKNOWN NAMED AGENTS OF UNITED STATES JUSTICE DEPARTMENT; UNKNOWN NAMED AGENTS OF UNITED STATES POSTAL SERVICE; UNKNOWN NAMED AGENTS OF UNITED STATES MARSHAL SERVICE; AND JOHN & JANE DOE 1-25, DEFENDANTS

Aug. 19, 2003

MEMORANDUM-DECISION AND ORDER

HURD, District Judge.

I. *INTRODUCTION*

Susan Hallock ("Hallock") and Ferncliff Associates, Inc. (collectively "plaintiffs"), filed suit under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) ("*Bivens*"), against Robert C. Bonner, Richard Will, Dennis P. Harrison, Margaret M. Jordan, Thomas Virgilio, and other unnamed employees of the United State Customs and Treasury, the United States Justice Department, the United States Postal Service, and the United States Marshal Service (collectively "defendants"). In response, defendants answered and filed a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). Plaintiffs opposed. Oral argument was heard on August 8, 2003 in Utica, New York. Decision was reserved.

II. *BACKGROUND*

Hallock owned Ferncliff Associates, Inc., located in Herkimer, New York. On June 8, 2000, in the course of a child pornography investigation, defendants detained several of plaintiffs' computer systems. No criminal charges were filed against them, and the property was eventually returned to plaintiffs on December 21, 2000. According to plaintiffs, four out of the nine computer systems that were seized were unusable when returned, and various stored data, including client, business and personal records, intellectual property, proprietary designs, and trade secrets, were not recoverable. Plaintiffs claim that these losses forced them to close their business, and accordingly, they incurred further financial loss.

After unsuccessful attempts to restore the situation through administrative and informal channels, plaintiffs filed a complaint for damages against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671 *et. seq.* The government filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction due to an exception to the FTCA, 28 U.S.C. § 2680(c), and Fed. R. Civ. P. 12(b)(6),

for failure to state a claim upon which relief may be granted. The government's motion was granted pursuant to section 2680(c)[1] and plaintiffs' complaint was dismissed. *See Hallock v. United States*, 253 F. Supp. 2d 361 (N.D. N.Y. 2003).

However, while the government's motion to dismiss was pending, plaintiffs filed the instant *Bivens* action against defendants, all government employees allegedly involved in the seizure and detention of plaintiffs' property. After plaintiffs' action against the United States was dismissed, defendants moved to dismiss this action, alleging lack of subject matter jurisdiction pursuant to the judgment bar in 28 U.S.C. § 2676, and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

III. *DISCUSSION*

A. *Applicability of the Judgment Bar*

Defendants argue that the judgment entered in the government's favor on plaintiffs' FTCA claim bars plaintiff from proceeding against the individual defendants in the instant suit. Title 28 U.S.C. § 2676 provides that "[t]he judgment in an action under [the FTCA] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." The bar was intended to prevent dual recovery from both the government and its employees, and the waste of government resources in defending repetitive suits. *Gasho v. United*

[1] Section 2680(c) is an exception to the United States' waiver of immunity under the FTCA. It precludes claims against the government arising from "the detention of any goods or merchandise by any officer of customs or any other law enforcement officer." 28 U.S.C. § 2680(c)

States, 39 F.3d 1420, 1437-38 (9th Cir. 1994) (citing *Kreines v. United States*, 959 F.2d 834 (9th Cir. 1992)).

As an initial matter, defendants argue that plaintiffs' FTCA complaint was dismissed pursuant to both Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 12(b)(1). The dismissal was expressed as follows: "Pursuant to § 2680(c), plaintiffs are precluded from pursuing their claim under the Federal Tort Claims Act. All of plaintiffs' claims arise out of the detention of their property by agents of the United States, and are therefore barred." *Hallock*, 253 F. Supp. 2d at 368. Because it was determined that § 2680(c) deprived the court of subject matter jurisdiction, the dismissal was pursuant to Fed. R. Civ. P. 12(b)(1), not Fed. R. Civ. P. 12(b)(6).[2] *See Rhulen Agency, Inc. v. Alabama Ins. Guar. Assn.*, 896 F.2d 674, 678 (2d Cir.1990); *see also Hostetler v. United States*, 97 F. Supp.2d 691, 695 (E.D. Va. 2000) ("Federal courts . . . lack subject matter jurisdiction to review actions falling within any one of the exceptions to the FTCA.").

[2] Defendants' argument that the dismissal was also pursuant to Rule 12(b)(6)—for failure to state a claim—is taken from one sentence in the opinion. *See Hallock*, 253 F. Supp. 2d at 363 ("While 'the court should consider the Rule 12(b)(1) challenge first[,] since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined' when a party moves pursuant to both subsections of Rules 12, the United State's motion is well taken under the more lenient Rule 12(b)(6).") (citation omitted). As is obvious from the remainder of the opinion, Rule 12(b)(6) was not a basis used to dismiss the complaint. At no time were the merits of plaintiff' claims discussed. The sole issue determined in the opinion—*i.e.*, whether § 2680(c) barred suit—was a legal one. The above-quoted language was mere dicta, inserted to demonstrate that even if the allegations are taken as true, § 2680(c) nonetheless prohibited plaintiffs from proceeding.

Defendants have cited numerous cases for the proposition that any FTCA judgment precludes a subsequent *Bivens* action. However, unlike the instant case, the courts in those cases were not confronted with *Bivens* actions filed subsequent to a FTCA claim dismissed for lack of subject matter jurisdiction. *See Gasho*, 39 F.3d at 1436 (prior determination on summary judgment); *Farmer v. Perrill*, 275 F.3d 958, 962 (10th Cir. 2001) (prior dismissal pursuant to Fed. R. Civ. P. 41(b)); *Arevalo v. Woods*, 811 F.2d 487, 488 (9th Cir. 1987) (FTCA claims determined pursuant to a bench trial); *Serra v. Pichardo*, 786 F.2d 237, 239 (6th Cir. 1986) (FTCA claims determined pursuant to a jury trial); *Rodriguez v. Handy*, 873 F.2d 814, 816 (5th Cir. 1989) (FTCA claims determined pursuant to a bench trial).[3] Defendants nevertheless claim that there is no limit to the judgment bar and that the moment any judgment is entered on an FTCA claim a *Bivens* claim is precluded. This broad reading would have the practical effect of foreclosing the enforcement of substantive rights for no other reason than the commission of an earlier procedural error.

It is true that many courts, presumably focused on preserving resources and avoiding duplicative lawsuits, have stated that the proper way to avoid the judgment bar is to include claims against the government and

[3] Defendants also cite *Hoosier Bancorp v. Rasmussen*, 90 F.3d 180, 184 (7th Cir. 1996). However, the Seventh Circuit in that case simply stated that the district court "entered judgment for the defendants in that case." *Id.* Neither party provided a copy of the lower court's decision dismissing the case and this court's search for the same was unsuccessful. Regardless, the court in *Hoosier* does not address the issue presented here, i.e., the legal effect of dismissal for lack of subject matter jurisdiction under § 2676.

individual government employees in the same lawsuit.[4] *See e.g., Gasho*, 39 F.3d at 1438.; *Arevalo*, 811 F.2d at 487. Using this tactic, even if the claims against the government are dismissed—i.e., it is determined that an exception to the waiver of sovereign immunity applies—the claims against the individual defendants would survive since such claims are brought at the same time and are not therefore subsequent. Defendants's interpretation of § 2676, of course, rejects even this position. Defendants, pointing to the absence of qualifying language in the statute, argue that any judgment in favor or against the government precludes suit against the individual government employees allegedly involved in the constitutional deprivation.

To demonstrate the potential destructiveness of defendants' interpretation of § 2676, consider the following example drawn from the view of the courts cited above. Plaintiff files suit in federal district court, alleging an FTCA claim against the government and a *Bivens* claim against individual government employees allegedly involved in the deprivation of plaintiff's constitutional rights. The government quickly files a motion to dismiss for lack of subject matter jurisdiction, contending that sovereign immunity was not waived on the particular facts before the court. The court agrees with the government, dismissing the claim against the government and entering judgment in its favor. The individual defendants thereafter move to dismiss the

[4] It should be noted that the filing of claims against both the government and its employees in these situations is not statutorily required. The example simply serves to illustrate the effect of defendants' interpretation of the judgment bar statute on facts even more favorable than those presented in this lawsuit.

claims against them, contending that this judgment, pursuant to § 2676, bars suit against them.

Under defendants' interpretation of the statute, the individual defendants' motion would be granted, despite the fact that no repetitious litigation transpired, as the merits of the claims against the government were not reached and the claims against the individual defendants were brought in the same lawsuit, and despite the fact that no possibility of dual recovery is presented. In fact, concerns regarding that purpose of the judgment bar statute have been entirely eliminated by granting the government's motion to dismiss. Further, resources are not wasted. In the scenario, assume the plaintiff, like the ones here, had a good faith, albeit ultimately incorrect, basis for believing that sovereign immunity was waived. In such a situation, a plaintiff's attorney is not only encouraged, but duty-bound to pursue the claim. That the court ultimately rules against the plaintiff should not serve as a penalty for making the argument. Defendants' interpretation of § 2676 is therefore rejected, and plaintiffs' earlier procedural loss does not prevent them from pursuing enforcement of their substantive rights against the proper defendants.

B. *The Bivens Claim*

"The standard for granting a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings is identical to that of a Fed. R. Civ. P. 12(b)(6) motion for failure to state a claim. In both postures, the district court must accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor. The court will not dismiss the case unless it is satisfied that the complaint cannot state any set of facts that would

entitle him to relief." *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001) (citations omitted). As the Supreme Court explained in *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), "[T]he Federal Rules of Civil Procedure (Rules) do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a 'short and plain statement of the claim' that will give a defendant fair notice of what a plaintiff's claim is and the grounds upon which it rests. [Fed. R. Civ. P. 8(a)(2)]." *Id.* at 47, 78 S. Ct. 99.

In order to state a cause of action under *Bivens*, plaintiffs must allege that defendants acted under color of law to deprive them of their constitutional rights. *Barbera v. Smith*, 654 F. Supp. 386, 394 (S.D.N.Y. 1987). Plaintiffs' Amended Complaint alleges that defendants, employees of various departments of the government, "intentionally caused total and permanent damage to the [plaintiff's] computer equipment resulting in the complete loss of all stored data as well as loss of computer equipment, all critical to the continued business operations of the plaintiff," (Pls' Compl. ¶ 14 C.), in violation of plaintiffs' Fifth Amendment due process rights. These allegations, if true, provide a basis for relief and are sufficient to put defendants on notice as to the nature of the claim against them.[5]

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[5] No opinion is expressed as to whether plaintiffs can survive further motion practice. For example, if it turns out that plaintiffs did simply just substitute the word "intentional" for the word "negligent" in amending their complaint, and are unable to procure any evidence in support of their belief in the intentional nature of defendants' alleged conduct, summary judgment may well be appropriate. However, at this stage of the litigation, where all plaintiffs' allegations are taken as true, dismissal is inappropriate.

IV. *CONCLUSION*

Because plaintiffs' FTCA suit against the government was dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, and allowing plaintiffs to proceed does not offend the purposes of § 2676, the judgment bar statute does not bar plaintiffs' *Bivens* suit. Furthermore, under the liberal rules for notice pleading, plaintiffs have sufficiently stated a claim for which relief may be granted.

Accordingly, it is

ORDERED that defendants' motion for judgment on the pleadings is DENIED.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

No. 02-CV-942

SUSAN HALLOCK, AS PRESIDENT AND 100% STOCKHOLDER OF FERNCLIFF ASSOCIATES, INC., D/B/A MULTIMEDIA TECHNOLOGY CENTER; AND FERNCLIFF ASSOCIATES, INC., D/B/A MULTIMEDIA TECHNOLOGY CENTER, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

March 21, 2003

MEMORANDUM-DECISION AND ORDER

HURD, District Judge.

I. *INTRODUCTION*

Plaintiffs, Susan Hallock ("Hallock"), as President and sole shareholder of Ferncliff Associates, Inc., d/b/a Multimedia Technology Center, and Ferncliff Associates ("Ferncliff"), Inc., d/b/a Multimedia Technology Center, brought suit against defendant United States of America ("United States") pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, alleging six causes of action: (1) negligent destruction of property; (2) conversion of property; (3) negligent bailment;

(4) larceny; (5) misfeasance; and (6) personal injury (mental pain and suffering).

The United States filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), and failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6). Sovereign immunity is the grounds for this relief. Plaintiffs oppose. Oral argument was heard February 14, 2003, in Utica, New York. Decision was reserved.

II. *FACTUAL BACKGROUND*

The following are the facts, taken from the pleadings, or, where undisputed, from the moving papers.

On June 8, 2000, United States Customs Service agents, along with other federal agents acting in a law enforcement capacity, served and executed a search warrant on the premises located at 194 Ferncliff Road in Mohawk, New York. Said premises served as the residence of Hallock and her husband, and as business offices for Ferncliff. Hallock is the sole stockholder of Ferncliff, a corporation authorized to do business in New York State. Pursuant to the search warrant, the agents seized computer equipment, software, and hard disk drives that allegedly had been, or were being, used by Hallock's husband to commit certain child pornography offenses in violation of 18 U.S.C. §§ 2252, 2252A.[1] Plaintiff alleges that the property taken

[1] Plaintiffs allege that the information used as a basis for the search warrant was mistaken. According to plaintiffs, while in the course of making lawful credit card purchases on the Internet, Hallock's husband was the victim of "identity theft," whereby his identifying information was used to establish a child pornography web site. As of this date, Hallock's husband has not been charged with any criminal offense.

included their "Computer Software Intellectual Property, all computerized Proprietary Computer Software Design Documents, all Computerized Personal Records, all Computerized Business Records, all Computerized Accounts, Client Files, and Business as well as Technological Trade Secrets belonging to [p]laintiffs." (First Restated and Amended Complaint for Damages, Docket No. 10, ¶ 6).

After some disputes regarding the terms of the return of the property, on December 21, 2000, plaintiffs' property was returned to Hallock's husband. Upon arriving home, plaintiffs allege that Hallock's husband discovered that "four of the nine computer systems [seized] were damaged to the extent of being totally unusable and that the loss of three of these computers necessitated the discontinuance of normal business operations of plaintiffs." (Plaintiffs' First Amended Memorandum of Law in Opposition to the United States' Motion to Dismiss, Docket No. 20, pp. 2-3). Further, plaintiffs allege that "five computer hard disk drives were damaged to the point of complete loss of all stored data," which included all of plaintiffs' "intellectual property, software design documents, and business and personal files." (*Id.* at 3). Plaintiffs claim that "[i]ndependent third party reviews by fully qualified and licensed hard drive data recovery companies indicate the data stored on [the] hard disk drives is completely lost and unrecoverable for all time." (First Restated and Amended Complaint for Damages, Docket No. 10, ¶ 9).

After being unable to resolve the issue with the United States Attorney's Office, plaintiffs filed an administrative claim for damages with the United States Customs Service, the United States Treasury,

the United States Department of Justice, the United States Postal Service, and the United States Marshals Service in the amount of $3,219,670.00. (*See* Administrative Claim for Damage, Injury, or Death, attached as part of Exh. 1 to Docket No. 10). After no action was taken on the administrative claim, plaintiffs filed a Complaint for Damages against the United States. (*See* Docket No. 1). Plaintiff thereafter filed a First Restated and Amended Complaint for Damages, amending, inter alia, the amount of damages sought to $4,421,700.00. (*See* Docket No. 10).

III. *DISCUSSION*

A. *MOTION TO DISMISS STANDARD*

As noted above, the United States has moved, pursuant to both Fed. R. Civ. P. 12(b)(1) and 12(b)(6), to dismiss the First Restated and Amended Complaint for Damages. While " 'the court should consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined'" when a party moves pursuant to both subsections of Rule 12, *Rhulen Agency, Inc. v. Alabama Ins. Guar. Assn.*, 896 F.2d 674, 678 (2d Cir.1990) (internal citations omitted), the United States' motion is well taken even under the more lenient Rule 12(b)(6). In deciding such a motion, a court "must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant; it should not dismiss the complaint 'unless it appears beyond a reasonable doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief.'" "*Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994)

(quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *see also Kaluczky v. City of White Plains*, 57 F.3d 202, 206 (2d Cir. 1995). However, conclusory allegations that merely state the general legal conclusions necessary to prevail on the merits and are unsupported by factual averments will not be accepted as true. *See, e.g., Clapp v. Greene*, 743 F. Supp. 273, 276 (S.D. N.Y. 1990); *Albert v. Carovano*, 851 F.2d 561, 572 (2d Cir. 1988).

B. *SOVEREIGN IMMUNITY*

It is well established that the United States is entitled to sovereign immunity and can therefore not be sued without its consent. *See Honda v. Clark*, 386 U.S. 484, 501, 87 S. Ct. 1188, 18 L. Ed. 2d 244 (1967); *Wilson v. United States*, 959 F.2d 12, 14 (2d Cir. 1992) (citing *Lehman v. Nakshian*, U.S. 156, 160, 101 S. Ct. 2698, 69 L. Ed. 2d 548 (1981); *Akutowicz v. United States*, 859 F.2d 1122, 1125 (2d Cir. 1988)). "To alleviate the harshness of this rule, Congress enacted the Federal Tort Claims Act which permits civil actions against the United States for personal injury and property damage caused by 'the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.'" *Lambertson v. United States*, 528 F.2d 441, 443 (2d Cir. 1976). Because the FTCA is considered a waiver of the United States' sovereign immunity, it is "strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996). Indeed, several different claims against the United States cannot lie under the FTCA, pursuant to enumerated exceptions to its invocation found in 28 U.S.C. § 2680. *See Kosak v. United States*, 465 U.S. 848, 852, 104 S. Ct. 1519, 79 L. Ed. 2d 860 (1984) ("[T]he

[FTCA]'s broad waiver of sovereign immunity is, however, subject to 13 enumerated exceptions"). Of particular interest in this case is the exception found in 28 U.S.C. § 2680(c) (" § 2680(c)").

Section 2680(c) provides, in relevant part, that the United States may not be sued for "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the *detention* of any goods, merchandise, or other property by any officer of customs or excise or *any* other law enforcement officer[.]" 28 U.S.C. § 2680(c) (emphasis added). Plaintiff essentially makes two arguments against the applicability of this exception: (1) that the exception covers only officers performing tax or customs duties, and the duties being executed by the officers at issue here were not of those types; and (2) that plaintiffs' claims do not arise from the "detention" of goods, which is covered by the exception, but instead from the "seizure" of goods, which is not covered by the statute. Both arguments have their roots in the Sixth Circuit's opinion in *Kurinsky v. United States*, 33 F.3d 594 (6th Cir. 1994) .

1. ***Officers covered by § 2680(c)***

Plaintiffs first argue that the officers in question were not performing customs duties when serving and executing the search warrant because the investigation of child pornography is not within the purview of the United States Customs Service. This position is rejected. As pointed out by the United States, "an officer of the customs may . . . execute and serve any order, warrant, subpoena, summons, or other process issued under the authority of the United States." 19 U.S.C. § 1589a(2). Under this language, in a general sense, customs officers may execute a search warrant for any

crime. The interstate transportation or receipt of child pornography is made a criminal offense by 18 U.S.C. §§ 2252, 2252A. Therefore, even if executing search warrants for suspected child pornography violations is not within the normal purview of what is traditionally thought to be a customs function, it is permissible so long as the Secretary of Treasury permits it.

In addition, executing such warrants is not inconsistent with customs officers' duties. According to 19 U.S.C. § 1589(4), the Secretary of Treasury essentially defines customs duties. It appears the duties have been so defined here to include the investigation of child pornography. Customs officers have been traditionally responsible for investigating wrongdoing on a national and even global stage, and have had substantial duties in investigating and serving search warrants upon alleged purveyors of child pornography. *See United States v. Demerritt*, 196 F.3d 138 (2d Cir. 1999); *United States v. Jasorka*, 153 F.3d 58 (2d Cir. 1998); *United States v. Harvey*, 991 F.2d 981 (2d Cir. 1993); *United States v. Swanson*, 1993 WL 372269 (N.D. N.Y. Sep. 15, 1993). The advent of the Internet expanded its role considerably beyond investigation of tangible items such as paintings being smuggled into and out of the country to the investigation of crimes involving computer imagery, such as the proliferation of child pornography. Therefore, as long as the officers at issue here were acting at the Secretary of Treasury's behest, and there is no argument they were not, the position that they were not engaged in customs duties cannot be sustained.

Even if it is assumed that customs duties were not being executed in serving the search warrant, and that another agency's tasks—such as the FBI's—were

instead being executed, the United States is still protected by § 2680(c). The Supreme Court has yet to rule whether § 2680(c) covers only law enforcement officers operating in a customs or tax capacity, *Kosak*, 465 U.S. at 852 n. 6, 104 S. Ct. 1519, and only two courts have held that it does. *See Kurinsky*, 33 F.3d at 598 (6 th Cir. 1994); *Bazuaye v. United States*, 83 F.3d 482 (D.C. Cir. 1996). The vast majority of courts, including the Second Circuit and lower courts therein, have interpreted the exception's protection to extend to all law enforcement officers performing any law enforcement function. Specifically, the exception has been applied to situations involving DEA officers,[2] USDA inspectors,[3] INS border patrol officers,[4] Federal Marshals,[5] FAA employees,[6] and Bureau of Prison officials,[7] all performing jobs outside of the traditional customs context. These applications square with the Supreme Court's broad reading of § 2680(c), *see Kosak*, 465 U.S. 848, 104 S. Ct. 1519, and are a reasonable interpretation of the statutory language. Therefore, no matter how one

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[2] *Formula One Motors, Ltd. v. United States*, 777 F.2d 822 (2d Cir. 1985); *United States v. $149,345 United States Currency*, 747 F.2d 1278 (9th Cir. 1984); *Rufu v. United States*, 876 F. Supp. 400 (E.D.N.Y. 1994; *Sterling v. United States*, 749 F. Supp. 1202 (E.D.N.Y. 1990).

[3] *United States v. 2,116 Boxes of Boned Beef*, 726 F.2d 1481 (10th Cir. 1984).

[4] *Halverson v. United States*, 972 F.2d 654 (5th Cir. 1992); *Ysasi v. Rivkind*, 856 F.2d 1520 (Fed. Cir. 1988).

[5] *Schlaebitz v. United States Department of Justice*, 924 F.2d 193 (11th Cir. 1991).

[6] *United States v. Lockheed L-188 Aircraft*, 656 F.2d 390 (9th Cir. 1979).

[7] *Crawford v. United States Department of Justice*, 123 F. Supp. 2d 1012 (S.D. Miss. 2000).

classifies the duties executed by the officers in the instant case, the protection of § 2680(c) is available.

2. *"Seizure" versus "detention"*

Plaintiffs' other argument against the application of § 2680(c), the one to which more time is devoted, is that the exception covers only claims arising out of the "detention" of goods. According to plaintiffs, since the claims advanced here arise out of the "seizure" of goods, the exception is unavailable. In support of this argument, plaintiffs rely exclusively upon *Kurinsky*, 33 F.3d 594. In that case, the Sixth Circuit Court of Appeals contended that a "seizure" is "generally associated with a period of temporary custody or delay[,]" carrying with it "no connotation of permanent custody, nor . . . necessarily suggest[ing] an adversarial interest insofar as ownership is concerned." *Id.* at 597. On the other hand, stated the court, "a seizure has an 'after-the-fact' quality not associated with a detention. When goods are seized pursuant to a lawful search, their relevance to a legal proceeding already has been predetermined . . . The seizure is adversarial to the ownership interest of the person from whom the property is seized." *Id.* Thus, it was concluded that because the two words had such different meanings and Congress included only one—"detention"—in § 2680(c), claims arising out of "seizures" were not covered by the exception. *Id.*

At the outset, agreement is expressed with the *Kurinsky* court's contention that a detention is distinct from a seizure.[8] The words do have different meanings

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[8] However, as to any notion that the consequence of this distinction is that claims arising out of the "seizure," as opposed to "detention," of property, escape the reach of § 2680(c), no opinion is herein expressed or should be inferred. As plaintiffs' claims

in legal circles,[9] semantics, and ordinary usage.[10] What is rejected, however, is plaintiffs' application of the distinction to the instant case. While plaintiffs intimate that the facts of *Kurinsky* are analogous to those of the case at bar, a cursory examination reveals this is not true. The plaintiffs in *Kurinsky* alleged that their property—seized by the FBI pursuant to a search warrant issued for suspicion of wire fraud and unauthorized reception of cable services—was "mishandled and damaged" *during* its seizure. *Id.* at 595. Accordingly, "the Kurinskys . . . alleg[ed] damages stemming from the *execution* of the search warrant." *Id.* (emphasis added). Here, plaintiffs are not alleging the damage was caused by the seizure and removal from the home of the computer equipment, software, and hard disk drives, or in any way by the execution of the search warrant. Instead, plaintiffs base their claims "on negligent acts *post- seizure* to a lawful search warrant." (Plaintiffs' First Amended Memorandum of Law in Opposition to the United States' Motion to Dismiss, Docket No. 20, p. 4) (emphasis added).

Use of the phrase "post-seizure negligent acts" is most fairly read to mean that the claims are based on

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clearly do not arise out of the "seizure" of their property, the question is not properly presented in this case.

[9] *Compare* BLACK'S LAW DICTIONARY 1363 (7th ed. 1999) (defining seizure as "[t]he act or an instance of taking possession of . . . property by *legal* right or process") *with* BLACK'S LAW DICTIONARY 459 (7th ed. 1999) (defining detention as "[t]he act or fact of holding a person [i.e. property] in custody").

[10] *Compare* WEBSTER'S NEW WORLD DICTIONARY 1216 (3d ed. 1988) (defining seize as "to take forcible legal possession[,]" or "to take forcibly and quickly"), *with* WEBSTER'S NEW WORLD DICTIONARY 375 (3d ed. 1988) (defining detention as "a keeping in custody").

damage allegedly inflicted during the "detention" of plaintiffs' property. By use of the prefix "post," plaintiffs are implicitly admitting that the alleged "negligent acts" occurred "after" the seizure. *See* WEBSTER'S NEW WORLD DICTIONARY 1054 (3d ed. 1988) (defining "post-" as meaning "after in time, later (than), following"). Simply put, "post-seizure" cannot be read to mean "seizure." Because § 2680(c)'s applicability turns on the classification of the time period in which plaintiffs allege their property was damaged or destroyed through the negligence of agents of the United States, such classification must be determined.

At the most fundamental level, it is known that the alleged damage and destruction occurred at some point "after" or "post-seizure," but before the property was eventually returned to plaintiffs. It is also known that plaintiffs are alleging such damage and destruction occurred while the property was in the possession, actual or constructive, of agents of the United States. The only time period that fits both of these criteria is when the property was being "detained" by the officers.

In summary, property was seized from plaintiffs' possession on June 8, 2000. The instant the property was seized and transported elsewhere, it was detained. There is simply no other way to classify it. In other words, the property seized was thereafter detained within the control and possession of agents of the United States from June 8, 2000, to December 21, 2000. It is within this time period that plaintiff alleges the damage and destruction occurred. However, as § 2680(c) provides protection during detentions, it is also within this time period that the United States retained its sovereign immunity. Therefore, though sym-

pathy is most certainly expressed for plaintiffs' situation, recourse through the FTCA is unavailable.[11]

3. *Claims barred*

It must finally be determined which of plaintiffs' claims are precluded pursuant to the applicability of § 2680(c). As noted, the exception bars any claim "arising in respect of" the detention of any goods or property by a customs officer or any law enforcement officer. Plaintiff has advanced claims for negligent destruction of property, conversion, negligent bailment, larceny, misfeasance, and personal injury. The Supreme Court has determined that "arising in respect of" "means 'any claim arising *out of* the detention of goods', and includes a claim resulting from negligent handling or storage of detained property." *Kosak*, 465 U.S. at 854, 104 S. Ct. 1519 (emphasis added).[12] All of

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[11] Indeed, this decision is not to be read as condoning the damage or destruction of any property seized pursuant to a search warrant. Though plaintiffs most certainly have suffered injury, assuming the truth of their allegations, the importance of the policy bases behind § 2680(c) cannot be undermined if the United States is to aggressively pursue criminals unrestrained by what would in other contexts be normal legal restraints on the treatment of others' property. By the same token, this decision is also not to be read as concluding that plaintiffs' property was damaged or destroyed by agents of the United States, through negligence or otherwise. The same is assumed only for the purposes of disposing of this motion.

[12] It should be noted that the Second Circuit has held that the "exception does not apply where the goods are no longer in possession of the government, and therefore cannot be regarded as being 'detained.'" *Mora v. United States*, 955 F.2d 156, 160 (2d Cir. 1992). While no opinion is expressed as to this holding's consistency or inconsistency with *Kosak*—namely because plaintiffs make no claims that the damage was inflicted after the United States' possession of their property ceased—*Mora* is not followed

plaintiffs' claims arise "out of the detention" of their property, and are thus precluded by § 2680(c). As the Court in *Kosak* noted, any argument "that § 2680(c) should not be construed in a fashion that denies an effectual remedy to many persons whose property is damaged through the tortious conduct of customs officials . . . has force, but it is properly addressed to Congress[.]" *Id.* at 862, 104 S. Ct. 1519.

4. *Lost business opportunities*

The United States has also moved to dismiss plaintiffs' claim for lost business opportunities and lost profits on the grounds that such claims are for "interference with contract right," and are excluded from the FTCA waiver of sovereign immunity pursuant to 28 U.S.C. § 2680(h). Because all claims must be dismissed as precluded pursuant to § 2680(c), a ruling need not be made on this point of the defendant's motion.

IV. *CONCLUSION*

Pursuant to § 2680(c), plaintiffs are precluded from pursuing their claims under the Federal Tort Claims

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to the extent it relies upon its prior decision in *Alliance Assurance Co. v. United States*, 252 F.2d 529 (2d Cir. 1958), as the sole support for the above-quoted language. The Supreme Court specifically took issue with the statement by the court in *Alliance Assurance* that the exception does not bar actions based on the negligent destruction of property in the possession or control of customs officers and the Court's holding, on its face, seems very much to usurp, or at the very least contradict, the statement. *See Kosak*, 465 U.S. at 854-55, 104 S. Ct. 1519 (quoting and disagreeing with *Alliance Assurance*, 252 F.2d at 534). Therefore, to the extent *Mora* is inconsistent with *Kosak*, it is rejected. *See Haughton v. F.B.I.*, No. 98 Civ. 3418(BSJ), available at 1999 WL 1133346, at *6 n. 1 (S.D.N.Y. Dec. 10, 1999) (following *Kosak* over *Mora* and *Alliance Assurance*) (collecting cases).

Act. All of plaintiffs' claims arise out of the detention of their property by agents of the United States, and are therefore barred.

Accordingly, it is

ORDERED that the First Restated and Amended Complaint for Damages is DISMISSED.

The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date: 12/29/04

Filed
Jan. 4, 2005

Docket Number: 03-6221-cv
Short Title: Hallock v. Bonner
DC Docket Number: 03-cv-195
DC: NDNY (SYRACUSE)
DC Judge: Honorable David Hurd
Honorable David Homer

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the day of two thousand four.

Present:

Hon. Roger J. Miner, Circuit Judge

Hon. Renna Raggi, Circuit Judge

Hon. Victor Marrero, Distric Court Judge

Docket No(s): 03-6221

SUSAN HALLOCK, FERNCLIFF ASSOCIATES, INC., DOING BUSINESS AS MULTIMEDIA TECHNOLOGY CENTER,
PLAINTIFF-APPELLEE

v.

ROBERT C. BONNER, RICHARD WILL, DENNIS P. HARRISON, MARGARET M. JORDAN, THOMAS VIRGILIO, UNKNOWN NAMED AGENTS OF UNITED STATES CUSTOMS AND TREASURY, UNKNOWN NAMED AGENTS OF UNITED STATES JUSTICE DEPARTMENT, UNKNOWN NAMES AGENTS OF UNITED STATES POSTAL SERVICE, UNKNOWN NAMED AGENTS OF UNITED STATES MARSHALL SERVICE, JOHN & JANE DOE, 1-25,
DEFENDANTS-APPELLANTS

A petition for panel rehearing having been filed herein by John & Jane Doe et al. Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED**.

For the Court,

Roseann B. MacKechnie, Clerk

By: [illegible]
Motion Staff Attorney

APPENDIX E

28 U.S.C. 1346. United States as defendant

* * * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

* * * * *

28 U.S.C. 2676. Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C. 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such

damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

* * * * *

28 U.S.C. 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other prop-

erty, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.[1]

* * * * *

[1] So in original.

(3)

No. 04-1332

Supreme Court, U.S.
FILED
APR 19 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ROBERT C. BONNER, et al.,

Petitioners,

v.

SUSAN HALLOCK, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO A PETITION FOR A WRIT FOR CERTIORARI

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QUESTION PRESENTED

28 U.S.C. § 2676, The Judgment Bar provides that a judgment in an action under § 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C. § 2679, Exclusiveness of Remedy provides, in part, that the protections from suit provided by § 1346(b) do not extend or apply to a civil action against an employee of the government which is bought for a violation of the Constitution of the United States.

The question presented is:

Whether a dismissal of a Federal Torts Claim, for lack of subject matter jurisdiction, pursuant to 28 U.S.C § 2680(c), bars a subsequent *Bivens* action by the claimant against Federal employees whose acts gave rise to the Destruction of its property.

PARTIES TO THE PROCEEDING

Petitioners are:

ROBERT C. BONNER, RICHARD WILL, DENNIS P. HARRISON, MARGARET JORDON, THOMAS VIRGILLO, UNKNOWN NAMED AGENTS OF THE UNITED STATES CUSTOMS AND TREASURY, UNKNOWN AGENTS OF THE UNITED STATES JUSTICE DEPARTMENT, UNKNOWN AGENTS OF THE UNITED STATES POSTAL SERVICE, AND UNKNOWN NAMED AGENTS OF UNITED STATES MARSHALL SERVICE AND JOHN AND JANE DOE, 1 THROUGH 25.

Respondents are:

SUSAN HALLOCK, FERNCLIFF ASSOCIATES, INC.,

D/B/A MULTI MEDIA TECHNOLOGY CENTER

CORPORATE DISCLOSURE STATEMENT

Comes now Respondent Ferncliff Associates Inc. and avers that has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Janise L. Miller
Attorney for Respondents

TABLE OF CONTENTS

		Page
Opinions Below		1
Jurisdiction		1
Statutory Provisions Involved		1
Introduction		2
Statement		2
Summary		5
Reasons for Denying the Petition		6
I.	In harmonizing the Westfall Act with the Judgment Bar respondents' *Bivens* claim must proceed under the facts of this particular case	6
II.	The Second Circuit Decision is not in error	11
III.	The ruling in the Second Circuit is not in conflict with decisions of the Seventh, Ninth and Tenth Circuits	15
IV.	The Second Circuit ruling in this instant action is consistent with previous rulings of the Second Circuit, Other Circuits, and the Supreme Court	18
Conclusion		23
Appendix A		App. 1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Baker v. Carr, 369 U.S. 186 (1962) 11, 17, 18

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) ..... *passim*

Closed Circuit Corporation of America v. Jerrold Electronics Capital Corporation, 426 F. Supp. 361 (EDPA 1977) 18

Farmer v. Perrill, 275 F.3d 958 (10th Cir. 2001) 15

FDIC v. Myer, 510 U.S. 471 (1994) 23

Gasho v. United States of America, 39 F.3d 1420 (9th Cir. 1994) 14, 15, 16

Gordon v. National Youth Work Alliance, 675 F.2d 356 (US App DC 1982) 19

Hoosier Bancorp of Indiana, Inc. v. Rasmussen, 90 F.3d 180 (7th Cir. 1996) 16, 17

Johnson v. The Smithsonian Institution, 189 F.3d 180 (2nd Cir. 1999) 19

Leavell v. Kieffer, 189 F. 3d 492 (7th Cir. 1999) 19

Michalik v. Hermann, No. Civ. A. 99-3496, 2002 WL 31844910 (E.D. La. Dec. 16, 2002) 12, 13

Millares Guiraldes de Tineo v. United States, 137 F.3d 715 (2nd Cir. 1998) 19, 20, 21

Sopp v. Gehrlin, 6 F. Supp. 823 (WDPA 1964) 16

United States v. Estate of Francis J. Romani, et al., 523 U.S. 517 (1998) 6, 8

United States v. Smith, 499 U.S. 160 (1991) 21, 22

Westfall, et al. v. Erwin, 484 U.S. 292 (1988) 8

TABLE OF AUTHORITIES

Page

FEDERAL STATUTES AND RULES

18 U.S.C. §§ 2252, 2252A 2

26 U.S.C. § 6323(a) 7

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 ..... 19, 23

28 U.S.C. § 1346(b) ..... *passim*

28 U.S.C. § 2401(b) 13, 20, 21

28 U.S.C. § 2671, et seq. 1, 3

28 U.S.C. § 2675(b) 20, 21

28 U.S.C. § 2676 ..... *passim*

28 U.S.C. § 2679 6

28 U.S.C. § 2679(b)(2)(A) 8, 14, 16, 22

28 U.S.C. § 2680(a) 17

28 U.S.C. § 2680(c) 3, 16

28 U.S.C. § 2680(k) 22

31 U.S.C. § 3713 7

Fed. R. Civ. Pro. 12(b)(1) 3, 19

Fed. R. Civ. Pro. 12(b)(6) 3, 4, 19

Fed. R. Civ. Pro. 12(c) 19

Fed. R. Civ. Pro. 41(b) 15

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Janise L. Miller, on behalf of respondents, respectfully submits this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 387 F.3d 147. The opinions of the District Courts are reported at 281 F. Supp. 2d 425 and 253 F. Supp. 2d 361.

JURSIDICTION

The judgment of the Court of Appeals was entered on October 22, 2004. An order denying a petition for rehearing was entered on January 4, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Torts Claim Act (FTCA) 28 U.S.C. §§ 1346(b)(1), 2671, et seq., and Amendment V of the United States Constitution are set out in an appendix to this petition.

INTRODUCTION

First and foremost, it must be noted that this entire civil action arose after the seizure of Respondents' (hereinafter Ferncliff) property pursuant to a search warrant. The search warrant stated that the items to be seized included evidence of the commission of an alleged criminal offense related to child pornography in violation of Title 18 U.S.C. §§ 2252 and 2252A. Neither Ferncliff nor any of its agents, employees, or family members have ever been charged with this offense. Unbeknownst to Ferncliff, Mr. Richard Hallock – husband of Susan Hallock, President of Ferncliff – was the victim of identity theft. As a result of the identity theft, unidentified persons unlawfully used credit card information belonging to Richard Hallock to establish a child pornography site on the internet.

Identity theft can happen to anyone as a result of using a credit card in the normal course of everyday business. Any innocent citizen has the potential of becoming a victim of identity theft for an act as innocuous as being a traveler or a consumer.

STATEMENT

On June 8, 2000, certain federal law enforcement officers, pursuant to a search warrant, searched the premises of Ferncliff and seized its business property as contraband, instrumentalities, and fruits or evidence in violation of 18 U.S.C. §§ 2252 and 2252A. The business property seized by the Federal Officers is listed as follows: all computer equipment, computer software, computer data and computer hard disk drives, which included all computerized proprietary Computer Software Design

Documents, all Computerized Accounts, Client Files, Business Files, as well as Technological Trade Secrets and Archival Backups.

On December 21, 2000, all computer equipment and computer hard drives were returned, except that four of the nine computer systems were destroyed beyond repair – totally unusable – and the loss of three of these computers necessitated the discontinuance of normal business operations of Ferncliff.

Also, five computer hard disk drives were destroyed to the point of complete loss of all stored data. This included all computerized Proprietatry Computer Software Design Documents, all Computerized Personal Records, all Computerized Business Records all Computerized Accounts, Client Files, Business Files, Technological Trade Secrets, and Archival Backup Copies. After unsuccessful attempts to restore the situation through administrative and informal channels, on July 18, 2002, Ferncliff filed a complaint for damages against the United States under the Federal Torts Claim Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671, et seq. It is undisputed that the Government filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), for *lack of subject matter jurisdiction* due to an exception to the FTCA, 28 U.S.C. § 2680(c), and Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief may be granted. The Government's 12(b)(1) motion was granted pursuant to § 2680(c) and Ferncliff's complaint was dismissed on March 24, 2003.

Prior to the dismissal of March 24, 2003, Ferncliff filed a *Bivens* action on February 13, 2003 against these Petitioners, known and unknown (hereinafter Government

Agents) all government employees involved in the destruction of Ferncliff's property. The Government Agents filed a Motion to Dismiss the *Bivens* action, alleging lack of subject matter jurisdiction pursuant to the judgment bar in 28 U.S.C. § 2676, and for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

On August 20, 2003, the Trial Court ruled on the Motion to Dismiss. The Honorable David N. Hurd held:

> 1) "Because it was determined that § 2680(c) deprived the Court of subject matter jurisdiction, therefore, the dismissal was pursuant to Federal Rule of Civil Procedure 12(b)(1), and not Federal Rule of Civil Procedure 12(b)(6), and, 2) Because Plaintiffs' FTCA suit against the Government was dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, and allowing Plaintiffs to proceed does not offend the purpose of § 2676, the judgment bar statute does not bar Plaintiffs' *Bivens* suit."

Furthermore, the Court held that under the liberal rules for notice pleading, Ferncliff had sufficiently stated a claim for which relief may be granted.

Petitioners appealed, and the Second Circuit Court of Appeals affirmed the District Court's conclusion that § 2676 does not bar Respondents' *Bivens* claim.

The majority of the Court held that "an action brought under the FTCA and dismissed for lack of subject matter jurisdiction because it falls within an exemption to the FTCA does not result in 'judgment in an action under § 1346(b)'" that triggers the judgment bar. The Court reasoned that there was no judgment in Respondents' prior case for purposes of § 2676 because "the action was

not properly brought under the Federal Torts Claim Act in the first place and is a nullity." According to the Court, "for the judgment bar to apply, the action must first be a proper one for consideration under the Federal Torts Claim Act." In other words, it must fit within the category of cases for which sovereign immunity has been waived. If it does not, then a judgment declaring a lack of subject matter jurisdiction denotes that Sovereign Immunity has not been waived and that the case is not justiciable in any event. Judge Marrero concurred with the majority but also offered alternative grounds for affirmation. Judge Marrero found that the term "on the merits" is implied after the word "judgment" in the Judgment Bar. The Second Circuit Court of Appeals denied the Government Agents petition for rehearing and suggestion of rehearing en banc.

SUMMARY

Respondents' Federal Torts Claim was not justiciable as Sovereign Immunity was not waived. Therefore the Judgment Bar was not applicable. In the alternative, the Judgment Bar can only be applied after an adjudication on the merits. Furthermore the Westfall Act of 1988 effectively limits the application of the Judgment Bar. The ruling of the Second Circuit is not in conflict with the rulings of any other circuits or the Supreme Court.

REASONS FOR DENYING THE PETITION

I. In harmonizing the Westfall Act with the Judgment Bar Respondents' *Bivens* claim must proceed under the facts of this particular case.

Respondent Ferncliff directs this Honorable Court's attention to the following: 1) The Judgment Bar was in effect in the year 1944; 2) *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 was decided in the year 1971; and 3) The Westfall Act amended 28 U.S.C. § 2679, exclusiveness of remedies, in the year 1988. The latter specifically states that the protections and immunities provided by the Federal Torts Claim Act do not extend or apply to any Civil action against an employee of the Government which is brought for violation of the Constitution of the United States.

In part, Ferncliff argues that the Westfall Act is controlling and that the Judgment Bar does not apply. Furthermore, Ferncliff asserts that the lower panel's ruling was correct in concluding that Ferncliff's *Bivens* complaint could not be defeated by prior dismissal of a Federal Torts Claim by reason of lack of jurisdiction where sovereign immunity was not waived.

On several occasions, the United States Supreme Court has concluded that a specific policy embodied in a later Federal Statute should control interpretation of the older Federal Statute despite that law's literal, unconditional text, and the fact that it had not been expressly amended by the later Act.

This concept was recently illustrated in the case of *United States v. Estate of Francis J. Romani, et al.*, 523 U.S. 517 (1998). In *Romani*, a third party perfected a $400,000 judgment lien and the Internal Revenue Service

filed notices of tax liens on the property afterwards. Because the property was encumbered by both the judgment lien and the Federal tax liens, the estate's Administrator sought the County Court's permission to transfer the property to the judgment creditor in lieu of execution. The Court authorized the conveyance, overruling the Federal Government's objection for the transfer arguing that it violated Federal priority statute, 31 U.S.C. § 3713(a) which provides that a Government claim "shall be paid first" when a decedent's estate cannot pay all of its debts.

The Superior Court of Pennsylvania affirmed, as did the Pennsylvania Supreme Court. The latter Court determined that there was a "plain inconsistency" between § 3713 and the Federal Tax Lien Act of 1966, which provides that a Federal Tax Lien "shall not be valid" against judgment lien creditors until a prescribed notice has been given. 26 U.S.C. § 6323(a). The Court concluded that the 1966 Act effectively limited § 3713's operation as to tax debts and noted that the 1966 Act modified the Government's preferred position in the tax area and recognized the priority of many estates claims over Federal tax liens.

Writing for an undivided Court, Justice Stevens stated that the proper inquiry is how best to harmonize the two statutes impact on a Government's power to collect delinquent taxes. In concluding that the Tax Lien Act was the governing statute, he wrote that that particular Act was the latest statute, the more specific statute, and its provisions are comprehensive, reflecting an obvious attempt to accommodate the strong policy objections to the enforcement of secret liens. Furthermore, he concluded that it represented Congress' detailed judgments as to when the Government's claims for unpaid taxes should yield to many different sorts of interest (including, e.g., judgment

liens, mechanic's liens, and attorney's liens) and many different types of properties (including, e.g., real property, securities, and motor vehicles).

As in the case of *Romani*, *supra*, this case too is presented with a specific policy embodied in a later Federal Statute that should control interpretation of the older statute despite that law's literal, unconditional text and that the fact that it had not been expressly amended by the later Act. The judgment bar took effect in the year 1948. The Westfall Act took effect in the year 1988.[1] The Act was designed to give stronger protection from personal lawsuits against Government employees who were guilty of negligence while acting within the scope of their employment. See Congressional Record: HR-4612 – House June 27, 1988 and Congressional – Senate, October 12, 1988.

Note, however, that while making the immunities from personal suit broader and more clarid, the Act specifically states that a Civil Action may still lie against an employee of the Government, which is brought for a violation of the Constitution of the United States. See 28 § 2679(b)(2)(A).

It would be fair to say, therefore, that the Westfall Act in effect includes in part a codification of *Bivens*. A review of the Congressional Record of the House of Representatives dated June 27, 1988 at page 15963 makes it clear

[1] The Westfall Act was passed after the Supreme Court's ruling in *Westfall, et al. v. Erwin*, 484 U.S. 292 (1988) where it was held that absolute immunity does not shield official functions from state-law tort liabilities unless the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature.

that the Legislators were specifically concerned about the issue of Constitutional Torts.

Quoting Mr. Frank in part:

> "In January of this year, I believe, the Supreme Court decided a case in which it held employees of the Federal Government liable for common garden variety type negligent suits. This bill simply restores what we believe to have been the law. It is a status quo ante-bill that says, 'If you are working for the Federal Government and within the scope of your employment', and we have procedures for deciding that if it is in dispute, 'and you are guilty of negligence', we are not talking about intentional acts of harming people, 'if you are guilty of negligence, the Federal Government, as it has always been, will be the Defendant under the Federal Torts Claims Act procedures.
>
> We make **special provisions** (emphasis added) here to make clear that the more controversial issue of Constitutional Torts is not covered by this bill. If you are accused of having violated someone's Constitutional rights, this bill does not affect it. You might be individually sued. That depends on other factors."

Mr. Frank goes on to say:

> "... other remedies under other acts, Civil Rights Acts, are not affected at all. It is an important one to restore a sense of security to hard working and dedicated people who work for this Federal Government – at too little compensation, I must say I believe – I hope that the bill is adopted".

Also see the Congressional Record of the Senate of October 12, 1988 at page 29933 where Mr. Grassley states:

> "Mr. President, I would like to emphasize that this bill does not have any affect on the so-called *Bivens* cases or Constitutional Tort Claims. Although this too is an area of concern to me – and I have introduced corrective legislation in the past – the bill we passed today has no impact on these cases which can continue to be brought against individual Government officials."

The preservation of the Constitutional Tort is clear from the language of the Westfall Act as well as from the language in discussion in both the House of Representatives and the Senate. Ferncliff avers that the specifically embodied policy in the Westfall Act of 1988 effectively limits the application of the older Judgment Bar of 1948 under the facts of this particular case. The Westfall Act is a later statute, more specific on the issue of personal liability for Constitutional Torts, and its provisions are comprehensive reflecting an obvious attempt to accommodate the strong policy objections to violation of Constitutional Rights by Government employees.

For the above stated reasons, Ferncliff's *Bivens* complaint should stand under the protections provided by the Westfall Act of 1988 and the Judgment Bar of 1948 should be ruled inapplicable under the facts of this particular case. In taking this approach, the two statute impact – the 1948 Judgment Bar and the 1988 Westfall Act – on Ferncliff's power to present this claim are harmonized along with the landmark decision in 1971 of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*. See *United States v. Estate of Francis J. Romani, et al., supra*.

As stated in *Bivens* by Justice Brennan, " . . . power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting – albeit Unconstitutionally – in the name of the United States possesses a far greater capacity for harm then an individual trespasser exercising no authority other than his own." For the above stated reasons, Ferncliff's *Bivens* claim should proceed and writ of certiorari should be denied.

II. The Second Circuit Decision is not in error.

The majority opinion, Judges Miner and Raggi, held that an action brought under the FTCA and dismissed for lack of subject matter jurisdiction because it falls within an exception to the restricted waiver of Sovereign Immunity provided by the FTCA does not result in a " . . . judgment in an action under § 1346(b)" [the Federal Torts Claim Act]. 28 U.S.C. § 2676. The majority decided that the action was not properly brought *under* the Federal Torts Claim Act in the first place and is a nullity. They reasoned that for the Judgment Bar to apply, the action must fit in the category of cases for which Sovereign Immunity has been waived. Sovereign Immunity had not been waived and Ferncliff's Federal Torts Claim was not justiciable in any event. Therefore the Judgment Bar did not apply.

The Supreme Court considered "justiciability" in the case of *Baker v. Carr*, 369 U.S. 186 (1962).

We quote:

> "In the instance of non-justiciability, consideration of a cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the

> duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted, can be judicially molded. In the instance of lack of jurisdiction, the cause either does not 'arise under' the Federal Constitution, laws or treaties (or fall within one of the other innumerated acts of ART III, § 2), or is not a 'cause or controversy' within the meaning of that section; or the cause is not one described by any jurisdictional statute."

Ferncliff's Federal Torts Claim was truly non-justiciable according to the rationale of the majority of the lower panel as well as according to the definition of that term as held in *Baker v. Carr*. The reasoning of the majority of the lower panel is sound. Sovereign Immunity had not been waived for Ferncliff's original Federal Torts Claim due to the § 2680(c) custom exception. Ferncliff's claim did not *arise under* any Federal Statute as Sovereign Immunity was not waived. Furthermore, Ferncliff's original Federal Torts Claim was not a *cause or controversy* within the meaning of the Federal Torts Claim Act.

In a separate concurring opinion, Justice Marrero not only concurs with the majority opinion but also offers alternative grounds for affirmation that he found to be even more compelling. Justice Marrero found that like the District Court in this particular case, the term "on the merits" is implied after the word "judgment" in the Judgment Bar. In bolstering his decision, Justice Marrero sites *Michalik v. Hermann*, No. Civ. A. 99-3496, 2002 WL 31844910 (E.D. La. Dec. 16, 2002).

In *Michalik*, Plaintiffs were detained during a drug sting operation while the home was searched. The Plaintiffs alleged their home was searched in error because the

officers relied upon outdated or stale information to determine that their drug suspect resided at Plaintiff's address. The Defendants argued that the *Bivens* complaint should be dismissed by reason of the Judgment Bar provision of 28 U.S.C. § 2676. That Court held that where a decision was favorable to the United States in a Federal Tort Claim because of a procedural defect in the Plaintiff's complaints and had nothing to do with the merits of the claim, the Judgment Bar would not apply.[3]

Paraphrasing Judge Hurd, of the Northern District, to demonstrate the potential destructiveness of the Government Agents' interpretation of § 2676, consider the following example. Plaintiff files suit in a Federal District Court alleging a FTCA claim against the Government and a *Bivens* claim against individual Government employees allegedly involved in the deprivation of Plaintiff's Constitutional Rights. The Government quickly files a motion to dismiss for lack of subject matter jurisdiction, contending that sovereign immunity was not waived on the particular facts before the Court. The Court agrees with the Government, dismissing the claim against the Government and entering judgment in its favor. The Defendants thereafter, move to dismiss the claims against them, contending that this judgment, pursuant to § 2676, bars suit against them.

Under Government Agents' interpretation of the statute, the Defendants' motion would be granted, despite the fact that no repetitious litigation transpired, the

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[3] In a later opinion, *Michalik v. Hermann*, No. Civ. A. 99-3496 2003 WL 21805037 (E.D. La. Aug. 4, 2003), the Court pointed out that Plaintiffs had failed to preserve their Federal Tort Claim by reason of non-compliance with the notification requirements of 28 U.S.C. § 2401(b).

merits of the claims against the Government were not reached, the claims against the Defendants were brought in the same lawsuit, and despite the fact that no possibility of dual recovery is presented.

In this scenario, Plaintiff's earlier dismissal of its claims against the United States for lack of subject matter jurisdiction (sovereign immunity) would prevent it from pursuing enforcement of its Constitutionally guaranteed substantive rights (also guaranteed under § 2679(b)(2)(A)) against the proper Defendants in their individual capacities under a *Bivens* claim. Clearly Government Agents' interpretation of § 2676 must be rejected as such would deprive the Plaintiff of its ability to pursue remedies for violations of its Constitutional rights.

It is true that one Circuit has opined that claims against the Government and individual employees would best be brought in the same claim [e.g. *Gasho v. United States of America*, 39 F.3d 1420 (9th Cir. 1994)]. However, as pointed out by Judge Hurd, the filing of claims against both the Government and its employees in the same lawsuit is not statutorily required. [MEMORANDUM – DECISION and ORDER.[FN4]]

Government Agents under the cloak of federal statutory authority and color of law, have deprived Ferncliff of its property in violation of the Constitution resulting in substantial damages as a consequence in an amount in excess of $4,000,000. The necessity and appropriateness of judicial review is no less compelling for Ferncliff than it was in the case of Webster Bivens.

The Second Circuit majority opinion holds that where jurisdiction under the FTCA is improperly invoked, the judgment bar does not apply as the original cause of action

is a nullity and is non-justiciable. The concurring point of view accepts this conclusion and expands upon it by arguing that in order to invoke the Judgment Bar the original Federal Torts Claim must have been adjudicated on the merits. Either way, the Judgment Bar should not be held to preclude Ferncliff's *Bivens* claim in this instant case for the above stated reasons.

III. The Ruling in the Second Circuit is not in conflict with Decisions of the Seventh, Ninth and Tenth Circuits.

The Government Agents in their briefs have argued that the panel's decision squarely conflicts with the decision of the Tenth Circuit and rely on *Farmer v. Perrill*, 275 F.3d 958 (10th Cir. 2001). Farmer filed a *Bivens* action against numerous prison employees for failing to treat his transexualism. Presumably, Farmer's previous Federal Tort Claim was properly brought under the FTCA and was subject to its restrictions.

Sovereign Immunity was not waived and subject matter jurisdiction was proper unlike the present situation. That action was defeated pursuant to a motion under Federal Civil Procedure 41(b) for failure of the Plaintiff to prosecute. It was held in *Farmer* that the Judgment Bar did preclude the *Bivens* claim because dismissal pursuant to Rule 41(b) constituted an adjudication on the merits. Defendant Government Agents cannot rely on *Farmer* as there was no issue of subject matter jurisdiction and as it was decided on the merits.

The Government Agents also rely on *Gasho v. United States of America*, 39 F.3d 1420 (9th Cir. 1994), where the Plaintiffs sued for emotional distress stemming from the

seizure of their airplane, pursuant to Arizona State Law that permits suing for emotional distress, as well as for false arrest and false imprisonment. Jurisdiction was proper for emotional distress claims since 28 U.S.C. § 1346, "law of the place", permitted the same. Upon completion of depositions and other discovery, summary judgment was granted on the Federal Torts Claim for the United States on all counts. The Gashos then filed a *Bivens* Action against the custom's agents claiming that the aircraft seizure and personal arrests violated their 4th and 5th Amendment Rights.

The District Court dismissed that *Bivens* Action pursuant to § 2676. In exercising its jurisdiction over both of the Gashos' appeals, summary judgment as to emotional distress, secondary to the seizure of the airplane was upheld in favor of the Government by the Ninth Circuit since it was claimed that it stemmed from the statutory exception provided by § 2680(c). Again, the Government Agents erroneously relied on *Gasho* where Sovereign Immunity was not waived since summary judgment is clearly an adjudication on the merits. *Sopp v. Gehrlin*, 6 F. Supp. 823 (WDPA 1964).

Gasho is further distinguished from the case at bar by the fact that the right to be free from emotional distress would simply not support a *Bivens* claim since said right is not guaranteed by the Constitution of the United States. However, the deprivation of property without due process is prohibited by the Constitution and the Westfall Act. 28 § 2679(b)(2)(A).

The Government Agents further rely on *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180 (7th Cir. 1996). First, in *Hoosier Bancorp*, the Seventh Circuit

concluded that Plaintiff's *Bivens* Action was barred by the Statute of Limitations. The Court then went on to hold that the § 2676 Judgment Bar precluded Plaintiff's *Bivens* Action after its Federal Torts Claim was dismissed for lack of subject matter jurisdiction pursuant to § 2680(a) – the discretionary exception of the Federal Torts Claim Act.

First, the Seventh Circuit had already decided that the *Bivens* Claim was precluded by the Statute of Limitations. Any further discussion in regard to the Judgment Bar was mere dicta as that discussion did not address the issue of the Statute of Limitations. A claim barred by the Statute of Limitations is an adjudication on the merits.

Second, as Ferncliff addresses said dicta, the Seventh Circuit neither considered nor correctly applied the principal of justiciability as stated by the majority of the panel as well as in *Baker v. Carr*, *supra*. An analysis of the principle of justiciability as held in Baker is germaine to determining whether a claim would be precluded by the Judgment Bar.

Third, the Seventh Circuit as pointed out by Judge Hurd of the Northern District, did not address the issue presented here: i.e., the legal effect of dismissal for lack of subject matter jurisdiction under § 2676 [MEMORANDUM – DECISION and ORDER[FN3]].

To follow the dicta of *Hoosier Bancorp* would be tantamount to emasculating judicial recognition of a cause of action implied directly under a Constitutional provision and first stated in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) and codified by the Westfall Act.

Constitutionally protected rights cannot be circumvented by an erroneous application of the § 2676 Judgment Bar which would conflict with the Constitution's safeguards provided by the Westfall Act, Amendment V, and *Bivens*. However viewed, absent justiciability in accordance with *Baker* or absent adjudication on the merits, the § 2676 Judgment Bar cannot be applied in a manner so as to deprive Ferncliff of Constitutionally and statutorily protected rights.

IV. The Second Circuit ruling in this instant action is consistent with previous rulings of the Second Circuit, Other Circuits, and the Supreme Court.

First, the panel decision is not in conflict with other decisions of the Second Circuit. The Second Circuit has not ruled that a dismissal based on the Statute of Limitations is a dismissal for lack of subject matter jurisdiction. The majority, **in dicta**, opined that where an action is *properly* pled under the FTCA, a judgment of dismissal based on the Statute of Limitations would justify the assertion of the Judgment Bar on a subsequent *Bivens* Action. Any alleged application of the Panel's dicta by the Government Agents fails to address the true issue that was before the Court. Clearly the Government Agents statement regarding said dicta is a misstatement of the law.

The Statute of Limitations defense has been addressed by the Courts via various statutory provisions. In *Closed Circuit Corporation of America v. Jerrold Electronics Capital Corporation*, 426 F.Supp 361 (EDPA 1977), Plaintiff sued Defendant for the alleged fraudulent sale of faulty electronic equipment. Having found no evidence of fraud outside of bare allegations, the court applied the

four year statute of limitations and ruled the action was time barred. In doing so the court noted that while the statute of limitations defense was an affirmative defense [Rule 8], the defense could still be properly disposed of under Rule 12(b)(6) – thus an adjudication on the merits.

In *Gordon v. National Youth Work Alliance*, 675 F.2d 356 (US App DC 1982), the timeliness of Plaintiff's right to pursue her EEOC claim (90-day rule) was in question. The Court noted that Statute of Limitations generally created an affirmative defense; and, that affirmative defenses when raised pursuant to Rule 12 should be pled under Rule 12(b)(6) and not Rule 12(b)(1). Again, Rule 12(b)(6), failure to state a claim, is an adjudication on the merits.

Moreover in *Leavell v. Kieffer*, 189 F.3d 492 (7th cir. 1999), where plaintiff brought a *Bivens* action against a tax auditor by reason of unfavorable testimony at trial, the District Court dismissed based on the statute of limitations defense and applied Rule 12(b)(1). However Rule 12(b)(1) addresses the justiciability of a claim. On appeal the Seventh Circuit affirmed the Statute of Limitations defense but held that Rule 12(c), judgment on the pleadings, applied-not Rule 12(b)(1), as applied by the lower Court. The Court pointed out that the Statute of Limitations defense in no manner affects the District Court's jurisdiction. Jurisdiction is supplied by 28 U.S.C § 1331 because a *Bivens* claim presents a Federal question.

In any event, the cases cited by the Government Agents do not support in any way that dismissal based on the Statute of Limitations is a dismissal for lack of jurisdiction. Both *Johnson v. The Smithsonian Institution*, 189 F.3d 180 (2nd Cir. 1999) and *Millares Guiraldes de Tineo v.*

United States, 137 F.3d 715 (2nd Cir. 1998) were dismissed for lack of subject matter jurisdiction due to the failure of the satisfaction of ante litem notice requirements under § 2401(b) and §§ 2401(b), 2675(b) respectively.

Johnson commenced action against the Smithsonian Institution asserting conversion and replevin claims in an attempt to recover artwork created by his uncle, *William Johnson*, that was in the possession of the Smithsonian Institution. The claims were dismissed on the grounds that the Plaintiff failed to comply with the FTCA's jurisdictional requirement under § 2401(b) – that a formal administrative claim seeking a sum certain be filed within two years after the contested injury accrued.

Because these notification requirements were not met, it was held that the District Court lacked subject matter jurisdiction to consider the claim. The issue addressed in *Johnson* was the failure to satisfy the requirements of § 2401(b) and not the issue of a Statute of Limitations. The Government Agents cannot rely on *Johnson* to support their contention that a Statute of Limitations defense is a dismissal for lack of jurisdiction. The holding in *Johnson* does not in any way contradict the ruling by the Second Circuit in *Hallock v. Bonner*.

In *Millares Guiraldes de Tineo v. United States*, *supra*, a DEA Agent was arrested for possession of cocaine in Bolivia while working as a confidential informant for the DEA Office in Lapas, Bolivia. Following her release, Millares presented the DEA with a document entitled "MEMORY AID AND PROPOSITION". The "Memory Aid" requested reimbursement for expenses and indemnity. At her deposition in the action, Millares testified that the amount in question was $38,000.

Some three years after her initial arrest, Millares presented to the DEA claims on Government Standard Form 95 requesting damages for unjust arrest and false imprisonment for amounts of over $1,000,000. The Court held that the "Memory Aid" did not satisfy the requirements of § 2675(b) and § 2401(b) inasmuch as it only requested reimbursement for "the expenses incurred". There was no mention of any request for compensation for false imprisonment or emotional suffering.

The Court also noted that that the Standard Form Claim, Form 95, was not filed until more than two years after the claim's accrual. Hence, the Standard Form Claims did not meet the time limitation imposed by the FTCA. The Court held that since the *notification requirements* of the Federal Torts Claim Act had not been met, the Court lacked subject matter jurisdiction.

Again, in *Millares*, *supra*, the issue before the Court was whether certain notification requirements of the FTCA had been met. As they were not, the Court lacked subject matter jurisdiction. The issue was not the Statute of Limitations but the failure to give timely notice as required by the Federal Tort Claim Act. The Government Agents cannot rely on *Millares* to support their contention that a Statute of Limitations defense is a dismissal for lack of jurisdiction. *Millares* is not in conflict with the holding of this Court in *Hallock v. Bonner*.

Furthermore, the ruling by the Second Circuit is not in conflict with any ruling by the Supreme Court of the United States. The Government Agents' attempt to rely on *United States v. Smith*, 499 U.S. 160 (1991) is misplaced. In *Smith*, Plaintiffs alleged medical malpractice on the part of an Army doctor who delivered their brain damaged child in the

United States Army Hospital in Vicenza, Italy. The Plaintiffs filed an action against the doctor concerned in his individual capacity. The Ninth Circuit held that because § 2680(k) of the FTCA precluded any remedy against the Government in cases arising from injuries incurred abroad, the Tort Claim Act against the individual doctor was not barred by the Westfall Act (a.k.a. Federal Employees Liability Reform and Tort Compensation Act of 1988). In reversing the Ninth Circuit, the Supreme Court held that the Westfall Act specifically was designed for this particular type of issue and that the Westfall Act precluded a lawsuit against the physician in his individual capacity.

However, the Government Agents, cannot rely on *Smith* for the proposition that a *Bivens* claim may not be brought after a Federal Tort Claim is dismissed where the Government has not waived Sovereign Immunity. The Westfall Act specifically preserves the *Bivens* claim as stated earlier in this brief in § 2679(b)(2)(A). It specifically memorializes a Plaintiff's right to bring an action for violation of a Constitutional provision in face of the fact that the Federal Tort Claim Act would not otherwise permit same.

Again, the Government Agents may not rely on *Smith, supra*. *Smith* is clearly distinguished from the instant case. *Smith* complained of personal injury and not of deprivation of a Constitutional Right. *Smith* alleged no *Bivens* complaint. Medical malpractice is not tantamount to violating any protected rights guaranteed by the United States Constitution and the Bill of Rights. A medical malpractice claim is an action for negligence and does not constitute a Government action prohibited by the Constitution or by Federal Statute. *Smith* is inapplicable. In the case of *Hallock v. Bonner* there is a palpable claim that the Government Agents violated the Constitutionally protected

rights of Plaintiffs and deprived them of their property without due process.

Further, the Petitioners cite *FDIC v. Myer*, 510 U.S. 471 (1994) in support of their contention that the Second Circuit was in error. Myer filed a *Bivens* claim against the FDIC for alleged wrongful termination of employment as the senior manager of a failed thrift institution.

In *Myer,* this Honorable Court ruled on both of his claims. First it held that the United States had not rendered itself liable under § 1346(b) for Constitutional tort claims. Second it held that a *Bivens* claim could not be extended to a Government Agency.

Ferncliff is not claiming jurisdiction under § 1346(b). Ferncliff claims jurisdiction under *Bivens*, the Westfall Act, § 1331 and the Fifth Amendment of the United States Constitution. Ferncliff is not suing a Federal agency. Ferncliff is suing any and all proper parties to a *Bivens* claim.

CONCLUSION

For the above stated reasons, Petitioners' writ of certiorari should be DENIED.

Respectfully submitted,

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TABLE OF APPENDICES

Page

Appendix "A"
Statutory Addendum.....App. 1

APPENDIX A

§ 1346(b)(1) United States as Defendant

Subject to the provisions of chapter 171 of this title, the District Courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

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§ 2676 Judgment As Bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter against the employee of the government whose act or omission gave rise to the claim. (June 25, 1948, c. 646 Stat. 984.)

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§ 2679 Exclusiveness of Remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising of resulting from the negligent or wrongful act of omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employees whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government –

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought under for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

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§ 2680 Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to –

(c) Any claim arising in respect to the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property

by any officer of customs or excise or any other law enforcement officer; except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise of any other law enforcement officer, if –

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(3) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law . . . [1]

Federal Rule of Civil Procedure 41(b)

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19, operates as an adjudication upon the merits.

U.S. CONSTITUTION: FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(2)

MAY 6 - 2005

No. 04-1332

In the Supreme Court of the United States

RICHARD WILL, ET AL., PETITIONERS

v.

SUSAN HALLOCK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

Cases:

Andrus v. *Glover Constr. Co.*, 446 U.S. 608 (1980) 4

Bivens v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 1

Bush v. *Lucas*, 462 U.S. 367 (1983) 4

FDIC v. *Meyer*, 510 U.S. 471 (1994) 7

Farmer v. *Perrill*, 275 F.3d 958 (10th Cir. 2001) 6

Gasho v. *United States*, 39 F.3d 1420 (9th Cir 1994), cert. denied, 515 U.S. 1144 (1995) 6, 9

Gutierrez de Martinez v. *Lamagno*, 515 U.S. 417 (1995) 3

Hoosier Bancorp, Inc. v. *Rasmussen*, 90 F.3d 180 (7th Cir. 1996) 6, 9, 10

Johnson v. *Smithsonian Inst.*, 189 F.3d 180 (2d Cir. 1999) 8

Massachusetts v. *United States*, 333 U.S. 611 (1948) 5

Millares Guiraldes de Tineo v. *United States*, 137 F.3d 715 (2d Cir. 1998) 8

Rodriguez v. *Handy*, 873 F.2d 814 (5th Cir. 1989) 6

Schweiker v. *Chilicky*, 487 U.S. 412 (1988) 4

Serra v. *Pichardo*, 786 F.2d 237 (6th Cir.), cert. denied, 479 U.S. 826 (1986) 6

United States v. *Estate of Romani*, 523 U.S. 517 (1998) 5

Cases—Continued: Page

United States v. *Smith*, 499 U.S. 160 (1991) .. 4, 5, 6, 7
Westfall v. *Erwin*, 484 U.S. 292 (1988) 3
Yamaha Corp. of Am. v. *United States*, 961 F.2d 245 (D.C. Cir. 1992), cert. denied, 506 U.S. 1078 (1993) 10

Statutes and rules:

Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4564 3
Federal Tort Claims Act:
28 U.S.C. 1346(b) 1, 7
28 U.S.C. 2401(b) 8
28 U.S.C. 2676 ..... 1, 2, 3, 4, 5, 7, 9, 10
28 U.S.C. 2679 2
28 U.S.C. 2679(a) 7
28 U.S.C. 2679(b) 2
28 U.S.C. 2679(b)(1) 3, 7
28 U.S.C. 2679(b)(2) 2, 3
28 U.S.C. 2679(b)(2)(A) 3, 6
28 U.S.C. 2679(b)(2)(B) 3, 6
28 U.S.C. 2679(d)(1) 3
28 U.S.C. 2680 ..... 7, 9
28 U.S.C. 2680(c) 7, 9, 10
26 U.S.C. 6323 5
31 U.S.C. 3713(a) 5

Rule—Continued: Page

Fed. R. Civ. P.:
Rule 12(b)(1) 8, 9
Rule 12(b)(6) 9

Miscellaneous:

1B James Wm. Moore, *Moore's Federal Practice* (2d ed. 1996) 10

In the Supreme Court of the United States

No. 04-1332

RICHARD WILL, ET AL., PETITIONERS

v.

SUSAN HALLOCK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The Federal Tort Claims Act (FTCA) provides, without limitation, that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar" to an action against a federal employee concerning the same subject matter as the FTCA suit. 28 U.S.C. 2676. Thus, a claimant who chooses to sue the United States under the FTCA is barred from suing a federal employee based on the same subject matter once her FTCA claim goes to judgment. In their brief in opposition, respondents do not dispute that they previously brought an action under 28 U.S.C. 1346(b), that judgment was entered against them in that FTCA action, and that the present action, brought against the individual government employees under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), arises out of the same subject matter as respondents' prior FTCA action. Section 2676, by its terms, thus bars respondents' suit. The court of appeals' contrary ruling squarely conflicts

with decisions of other courts of appeals and warrants review by this Court.

Respondents largely ignore the text of Section 2676 and focus instead on certain policy arguments that they view as sufficient to render Section 2676 inapplicable here "despite [its] literal, unconditional text," Br. in Opp. 6. None of those arguments is sound. Respondents' contention that the Court should recognize an implicit exception for constitutional claims in 28 U.S.C. 2676 based on the express exception for such claims in 28 U.S.C. 2679(b)(2) ignores the salient points that the difference in text should matter and that Section 2679(b)'s express exception only demonstrates that Congress knows how to exempt constitutional claims when it so desires. Moreover, to infer such a limitation in Section 2676 would render that provision largely superfluous because *Bivens* claims not excluded by Section 2679 are the claims most likely to implicate the judgment bar. It is with good reason that no court of appeals, including the court below, has adopted respondents' notion that *Bivens* claims are categorically outside the reach of Section 2676. See pp. 3-6, *infra*.

Respondents' attempts to defend the court of appeals' rationale fare no better. In particular, respondents' effort to distinguish between FTCA judgments that trigger Section 2676 and those that do not fails to account for the significant practical and conceptual overlap between "jurisdictional" and "merits" defenses under the FTCA and the fact that such defenses often may be raised either on a motion to dismiss or on summary judgment. Congress did not intend such subsidiary and often abstract issues to undermine the categorical nature of the judgment bar. Moreover, respondents' attempt to circumscribe the language of Section 2676 is inconsistent with this Court's decisions construing similar provisions of the FTCA.

A. Respondents' first argument (Br. in Opp. 6-11) does not seek to defend the court of appeals' decision on its own terms, but rather offers an alternative theory: that Congress impliedly amended 28 U.S.C. 2676 in 1988 to exempt constitutional claims against governmental officers from the judgment bar's scope when it enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, Pub. L. No. 100-694, 102 Stat. 4564. Respondents offer no authority for that novel proposition, which is contrary to the text of the very provisions respondents purport to "harmonize[]," Br. in Opp. 10.

The Westfall Act amended the FTCA to provide, as a general rule, that a suit against the United States under the FTCA is the exclusive remedy for torts committed by a federal employee acting within the scope of his employment, and that the United States should be substituted as the defendant in any such suit. See 28 U.S.C. 2679(b)(1) and (d)(1).[1] Section 2679(b)(2) creates an exception to that general rule for *Bivens* and certain statutory actions. See 28 U.S.C. 2679(b)(2)(A) and (B). Respondents contend that the Westfall Act's express exception for *Bivens* claims "should control interpretation of" Section 2676's judgment bar as well, "despite [Section 2676's] literal, unconditional text, and the fact that it ha[s] not been expressly amended by" the Westfall Act. Br. in Opp. 6. There is, however, no basis for the Court to ignore the "literal, unconditional text" of Section 2676 merely because the

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[1] The Westfall Act was enacted in response to this Court's decision in *Westfall* v. *Erwin*, 484 U.S. 292 (1988), which exposed federal employees to personal tort liability for actions that were within the scope of their employment but were not discretionary in nature. See *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 425-426 (1995).

Westfall Act expressly carves out an exception for *Bivens* claims from a different provision.[2]

To the contrary, as explained in the certiorari petition (at 17 n.5), Section 2679(b)(2)(A)'s explicit carve-out for *Bivens* claims is an additional reason *not* to read an implied exception for *Bivens* claims into Section 2676. By expressly excluding *Bivens* claims from the FTCA exclusivity provision when it enacted the Westfall Act, Congress demonstrated its awareness that that provision otherwise would have barred a *Bivens* action. But Congress did not carve out a similar exception to the judgment bar in Section 2676. As the Court noted in *United States* v. *Smith*, 499 U.S. 160 (1991), the Westfall Act exception for *Bivens* claims makes clear that Congress knew how to preserve constitutional-tort liability of federal employees when it desired to do so, and that inferring other exceptions in the FTCA is not warranted. See *id.* at 166-167 (citing *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.")).

In fact, it is not at all clear what function the judgment bar would continue to serve if the Court were to engraft the

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[2] To the extent respondents argue that a federal statute cannot, consistent with the Constitution, effect or limit *Bivens* remedies, see, *e.g.*, Br. in Opp. 11, 14, 18, that argument is foreclosed by this Court's decisions in *Bush* v. *Lucas*, 462 U.S. 367, 372, 389-390 (1983) (civil service statutes foreclose a *Bivens* action even if the "civil service remedies were not as effective as an individual damages remedy and did not fully compensate [the employee] for the harm he suffered"), and *Schweiker* v. *Chilicky*, 487 U.S. 412, 423 (1988) (declining to recognize *Bivens* remedy for Social Security claimants challenging termination of their benefits, explaining that "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies").

Westfall Act's exceptions onto Section 2676. In other words, the exception of *Bivens* and certain federal statutory claims alone from the Westfall Act means they are the classes of cases most likely to be affected by the judgment bar. If the judgment bar did not apply to those claims within the Westfall Act exemptions, it would be superfluous, because, with respect to all other claims, the United States could always substitute itself for the individual defendants and then move to dismiss on the same grounds that led to the dismissal of the first FTCA claim. See *Smith*, 499 U.S. at 166 (holding that the Westfall Act applies even where the FTCA provides no means of recovery).

This case is not like *United States* v. *Estate of Romani*, 523 U.S. 517 (1998), upon which respondents rely. See Br. in Opp. 6-10. *Romani* concerned the relative priority of federal liens over other claims. The general priority statute, 31 U.S.C. 3713(a), dating from 1797, states in general terms that the United States "shall be paid first" from an insolvent decedent's estate. *Romani*, 523 U.S. at 519. In the specific context of tax liens, however, Congress has more recently made a different determination as to which claims should take priority over the government's claim for unpaid taxes. *Id.* at 532 (citing 26 U.S.C. 6323). In that context, the Court held, as it had in other cases involving the priority statute, that the later, specific priority statute governed, rather than the earlier, general provision, which would have "frustrate[d] a specific policy embodied in a later federal statute." *Id.* at 530 (quoting *Massachusetts* v. *United States*, 333 U.S. 611, 635 (1948) (Jackson, J. dissenting)).

The Westfall Act's exception for *Bivens* claims from Section 2679(b)'s exclusivity provision would not be frustrated by applying the judgment bar, as written, to *Bivens* claims. The Westfall Act and Section 2676 impose *distinct* limitations on FTCA claims. This therefore is not a situation, as in *Romani*,

in which the question is whether a later statute supplants an earlier statute that covered the *same subject matter*. The Westfall Act "makes the FTCA the exclusive mode of recovery for the tort of a Government employee," except for constitutional and certain statutory violations. *Smith*, 499 U.S. at 166-167; 28 U.S.C. 2679(b)(2)(A) and (B). The judgment bar, by contrast, presupposes the existence of separate causes of action and prevents a claimant whose FTCA claim against the United States has gone to judgment from also seeking a remedy from individual federal employees. Nothing in the judgment bar prevents a claimant from electing to pursue a *Bivens* remedy against government officials who have violated her constitutional rights, so long as she has not brought a suit against the United States pursuant to the FTCA that has gone to judgment. Thus, the Westfall Act's exception for *Bivens* claims is not frustrated by the judgment bar, and there is no basis for reading an implied limitation into the judgment bar's express terms in order for it to be "harmonized," Br. in Opp. 10, with the Westfall Act.

Finally, it is notable that no court of appeals has embraced respondents' theory. Each of the six circuits to address the question has held that Section 2676 does apply to *Bivens* claims. See Pet. App. 12a-14a; *Farmer* v. *Perrill*, 275 F.3d 958, 963 (10th Cir. 2001); *Hoosier Bancorp, Inc.* v. *Rasmussen*, 90 F.3d 180, 184-185 (7th Cir. 1996); *Gasho* v. *United States*, 39 F.3d 1420, 1437-1438 (9th Cir 1994), cert. denied, 515 U.S. 1144 (1995); *Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989); *Serra* v. *Pichardo*, 786 F.2d 237, 241 (6th Cir.), cert. denied, 479 U.S. 826 (1986). Respondents' argument based on the Westfall Act accordingly provides no reason for the Court to decline to grant a writ of certiorari to resolve the important conflict that *does* exist among the circuits.

B. Respondents argue in the alternative (see Br. in Opp. 11-15) that the court of appeals was correct to hold that their

prior FTCA claim was "non-justiciable" and therefore a "nullity"—and that the judgment bar in 28 U.S.C. 2676 is therefore inapplicable—because their FTCA suit was dismissed for lack of subject matter jurisdiction on the basis of the FTCA's detention-of-goods exception, 28 U.S.C. 2680(c). Respondents cannot reconcile that argument with this Court's decisions construing the parallel text in other provisions of the FTCA, and they fail to come to grips with the breadth of their position in light of the fact that so many defenses under the FTCA can be viewed as "jurisdictional."

1. Respondents do not deny that they sued the United States under 28 U.S.C. 1346(b). But they nonetheless contend that the judgment dismissing that suit was not a "judgment in an action under 1346(b)" for purposes of 28 U.S.C. 2676 because the basis for the prior judgment was that the United States' sovereign immunity was preserved by the detention-of-goods exception in Section 2680(c). Br. in Opp. 11-12. That argument is inconsistent with this Court's decisions in *Smith* and *FDIC* v. *Meyer*, 510 U.S. 471 (1994). As the certiorari petition explains (at 16-19), those decisions construed similar language of the FTCA in 28 U.S.C. 2679(b)(1) ("[t]he remedy * * * provided by sections 1346(b) and 2672") and 28 U.S.C. 2679(a) ("claims * * * cognizable under section 1346(b)") to bar any state tort claim arising out of the conduct of a federal employee from being brought against a federal employee or agency, even though ultimate recovery against the United States might be precluded by one of the FTCA's limitations, such as one of the exceptions in Section 2680. *Smith*, 499 U.S. at 165-166; *Meyer*, 510 U.S. at 477 & n.5. Respondents point out certain factual differences between this case and those (Br. in Opp. 22-23), but they offer no analysis of the text of the FTCA provisions the Court construed in *Smith* and *Meyer* that would explain why the closely parallel language of Section 2676 should not be interpreted in the same manner.

2. As the petition demonstrates (at 11-14), the supposed distinction between jurisdictional and merits-based judgments, upon which the court of appeals relied, is unworkable in the context of the FTCA. Respondents in no way allay that concern. Rather, their attempts to explain the distinction provide further evidence of how ephemeral it is.

For example, the petition notes that, whereas the court of appeals identified a judgment on statute-of-limitations grounds as one that *would* trigger the judgment bar (Pet. App. 15a), a dismissal for lack of jurisdiction on statute-of-limitations grounds in the FTCA context can also be termed a dismissal on grounds of sovereign immunity—as, indeed, the Second Circuit itself has done. See *Johnson* v. *Smithsonian Inst.*, 189 F.3d 180, 189-190 (2d Cir. 1999); *Millares Guiraldes de Tineo* v. *United States*, 137 F.3d 715, 719-720 (2d Cir. 1998). Respondents agree that a statute-of-limitations dismissal is "an adjudication on the merits," Br. in Opp. 17, but disclaim any inconsistency with *Johnson* and *Millares*, *id.* at 19-20. Respondents contend that in *Millares*, for example, the issue "was not the Statute of Limitations, but the failure to give timely notice as required by the Federal Tort Claim Act." *Id.* at 21. But that is a distinction without a difference. Indeed, *Johnson* recognized that the notice requirement in 28 U.S.C. 2401(b), which provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues," *is* a "statute of limitations." See 189 F.3d at 190.

Respondents also embrace the court of appeals' distinction between the grant of a motion to dismiss for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1), which, in their view, does not trigger the judgment bar, Br. in Opp. 19, and a judgment in the government's favor at the summary judgment stage, which they concede *does* trigger the judgment bar, even when summary judgment is based on one of the FTCA's exceptions, see *id.* at 16 ("summary judgment [based on the exception provided by Section 2680(c)] is clearly an adjudication on the merits"). There is simply no basis in the text or purposes of Section 2676 to distinguish between a judgment dismissing a claim under Rule 12(b)(1) on the basis of one of the FTCA's exceptions in Section 2680, as occurred in respondents' prior FTCA suit, and a judgment on that same basis entered at the summary judgment stage of the litigation. The need for minimal factual development routinely forces courts to make jurisdictional judgments at the summary judgment stage, and, on the other hand, they just as routinely dismiss cases "on the merits" prior to factual development, pursuant to a 12(b)(6) motion to dismiss.

C. Finally, contrary to respondents' contention (Br. in Opp. 15-18), the Second Circuit's decision in this case creates a square conflict with decisions of the Ninth Circuit in *Gasho*, 39 F.3d 1420, and the Seventh Circuit in *Hoosier Bancorp*, 90 F.3d 180.

The *Gasho* plaintiffs, who sued under the FTCA and *Bivens* after their airplane was seized by customs agents, lost on at least one count of their FTCA action on summary judgment because the actions of the customs agents who seized their plane were excepted from liability under the FTCA by 28 U.S.C. 2680(c). See *Gasho*, 39 F.3d at 1433. Thus, that count, like respondents' FTCA claim here, failed because it was barred by sovereign immunity. The Ninth Circuit then proceeded to apply the judgment bar to the *Gasho* plaintiffs' corresponding *Bivens* claim, stating that because "we have affirmed the district court's judgment in favor of the United States in the FTCA claims involving the seizure of the aircraft, that prior judgment precludes any subsequent *Bivens* claim based on the seizure." *Id.* at 1438. Contrary to respondents' suggestion (Br. in Opp. 15-16), nothing in *Gasho* turns

on the nature of a claimant's tort allegations or the stage of the proceedings at which the ruling under Section 2680(c) occurred.

Respondents are also incorrect in asserting that *Hoosier Bancorp*'s conclusion that Section 2676 barred the plaintiffs' *Bivens* claims was dictum. The Seventh Circuit characterized that part of its *Hoosier Bancorp* decision as "an alternate ground for dismissing the present case." See 90 F.3d at 184. An alternative ground is not dictum. See 1B James Wm. Moore, *Moore's Federal Practice* ¶ 0.441[2], at III-523 (2d ed. 1996) ("a judgment based alternatively upon two determinations, either of which alone would have been sufficient to sustain it, is an effective adjudication as to both grounds, and is collaterally conclusive as to both"); *Yamaha Corp. of Am.* v. *United States*, 961 F.2d 245, 255 (D.C. Cir. 1992), cert. denied, 506 U.S. 1078 (1993) (same). Thus, as the Second Circuit recognized, the decision below squarely conflicts with *Hoosier Bancorp*. See Pet. App. 14a ("We do not stand with the Seventh Circuit in its analysis of the issue before us."). This Court should grant certiorari to resolve that conflict.[3]

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

MAY 2005

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[3] Respondents raise a question (Br. in Opp. 13-14) as to how the judgment bar should apply to a case in which an FTCA claim and a *Bivens* claim are filed together. That question is not presented in this case. Here, petitioners rely on a *final* judgment in a *separate* case as precluding respondents' *Bivens* claims.

Supreme Court, U.S.
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AUG 2 2 2005
OFFICE OF THE CLERK

No. 04-1332

In the Supreme Court of the United States

RICHARD WILL, ET AL., PETITIONERS

v.

SUSAN HALLOCK, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: APR. 4, 2005
CERTIORARI GRANTED: JUNE 6, 2005

TABLE OF CONTENTS

	Page
United States court of appeals docket entries	1
United States district court docket entries	6
Complaint for damages (filed Feb. 13, 2003)	19
Plaintiffs' first amended complaint for damages (filed May 1, 2003)	28
Judgment of the United States District Court for the Northern District of New York in Docket No. 02-cv-942, dated Mar. 24, 2003 (attached to Memorandum of Law in Support of Defendant's Motion for Judgment on the Pleadings, filed May 23, 2003)	36
Order (dated Oct. 6, 2003)	37
The following opinion, decisions, and order have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari	
Memorandum-Decision and Order of the United States District Court for the Northern District of New York in Docket No. 02-cv-942, dated Mar. 21, 2003 (attached to Memorandum of Law in Support of Defendants' Motion for Judgment on the Pleadings, filed May 23, 2003)	27a
Memorandum-Decision and Order of the United States District Court for the Northern District of New York, dated Aug. 19, 2003	18a
Opinion of the United States Court of Appeals for the Second Circuit, dated Oct. 22, 2004	1a
Order of the United States Court of Appeals for the Second Circuit denying petition for rehearing, filed Jan. 4, 2005	41a

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 03-6221-CV

SUSAN HALLOCK, FERNCLIFF ASSOCIATES, INC. DOING BUSINESS AS MULTIMEDIA TECHNOLOGY CENTER, PLAINTIFFS-APPELLEES

v.

ROBERT C. BONNER, RICHARD WILL, DENNIS P. HARRISON, MARGARET M. JORDAN, THOMAS VIRGILIO, UNKNOWN AGENTS OF UNITED STATES CUSTOMS AND TREASURY, UNKNOWN AGENTS OF UNITED STATES JUSTICE DEPARTMENT, UNKNOWN AGENTS OF UNITED STATES POSTAL SERVICE, UNKNOWN AGENTS OF UNITED STATES MARSHAL SERVICE, JOHN & JANE DOE 1-25, DEFENDANTS-APPELLANTS

DOCKET ENTRIES

DATE	PROCEEDINGS
10/17/03	Copy of notice of appeal and district court docket entries on behalf of Appellant Robert C. Bonner, Appellant Richard Will, Appellant Dennis P. Harrison, Appellant Margaret M. Jordan, Appellant Thomas Virgilio, Appellant Unknown Named Agent, Appellant Un

DATE	PROCEEDINGS
	Known Named Agent, Appellant Unknown Named Agent, Appellant Unknown Agent, Appellant John & Jane Doe filed. [03-6221] Form C due on 10/20/03,,. Form D due on 10/20/03,,. Filing Fee Waived [DT]
10/17/03	Copy of district court order dated 8/19/03 and endorsed by Hon. Hurd RECEIVED. [03-6221] [DT]
10/17/03	Copy of district court order dated 10/6/03 and endorsed by Hon. Hurd RECEIVED. [03-6221] [DT]
	* * * * *
3/11/04	APPELLANT John & Jane Doe, Unknown Named Agent, Dennis Harrison, Margaret Jordan, ET AL., brief FILED with proof of service. [TH]
3/11/04	APPELLANT John & Jane Doe, Unknown Named Agent, Dennis Harrison, Margaret Jordan, ET AL., appendix filed w/pfs. [TH]
4/8/04	APPELLEE Ferncliff Assoc, Susan Hallock, brief filed with proof of service. [TH]
	* * * * *

DATE	PROCEEDINGS
4/27/04	APPELLANT John & Jane Doe, Unknown Named Agent, Dennis Harrison, Margaret Jordan, ET AL.; APPELLEE Ferncliff Assoc, reply brief filed with proof of service. [TH]
	* * * * *
10/22/04	Judgment filed; judgment of the district court is AFFIRMED by detailed order of the court without opinion filed. (CJJ Miner) [WD]
10/22/04	Notice to counsel Opinion filed 10/22/04. [WD]
10/22/04	Judge Marrero concurs in a separate opinion, filed. [WD]
10/22/04	Judgment filed. [WD]
10/27/04	Errata sheet re: filed. [WD]
10/29/04	APPELLANT John & Jane Doe, Unknown Named Agent, Dennis Harrison, Margaret Jordan, et al.; APPELLEE Ferncliff Assoc, motion for clarification on time to file a Petition for rehearing received. [WD]
11/17/04	Errata sheet re: filed. [WD]

DATE	PROCEEDINGS
11/29/04	Appellant Robert Bonner, Appellant Richard Will, et al motion extended time to file petition for rehearing filed with proof of service. [DB]
12/3/04	Order FILED GRANTING motion extended time by Appellant Robert Bonner, Appellant Richard Will, Appellant Dennis Harrison, Appellant Margaret Jordan, Appellant Thomas Virgilio, Appellant John & Jane Doe, Appellant Unknown Named Agent, endorsed on motion dated 11/29/2004 [DB]
12/3/04	Appellee Ferncliff Assoc, Appellant Robert Bonner, Appellant Richard Will, et al petition for rehearing en banc filed with proof of service. [WD]
12/20/04	APPELLANT John & Jane Doe, Unknown Named Agent, Dennis Harrison, Margaret Jordan, ET AL; APPELLEE Ferncliff Assoc, petition for rehearing en banc received. [WD]
1/4/05	Order FILED DENYING motion petition for rehearing en banc by Appellee Ferncliff Assoc, Appellant Robert Bonner, Appellant Richard Will, Appellant Dennis Harrison, Appellant Margaret Jordan, Appellant Thomas Virgilio, Appellant John & Jane Doe,

DATE	PROCEEDINGS
	Appellant Unknown Named Agent, endorsed on motion dated 12/3/2004. A Petition for rehearing having been filed by John & Doe et al, Upon Consideration thereof, it is Ordered that said petition be and it hereby is Denied. (Present: RJM, RR, CJJ, VM DJ) (For the Court, Motion Staff Counsel, AMH) [WD]
1/19/05	Judgment MANDATE ISSUED. CLOSED [MR]
	* * * * *
6/13/05	Writ of Certiorari GRANTED 6/6/05. The petition for writ of certiorari is granted. In addition to the Question presented by the petition, the parties are directed to brief and argue the following Question: Did the Court of Appeals have jurisdiction over the interlocutory appeal of the District Court's order denying a motion to dismiss under the FTCA's judgment bar, 28 USC Sec 2676?. [WD]
6/13/05	Notice of reinstatement on behalf of due to granting of writ of certiorari on 6/6/05. Code: M [WD]
6/15/05	Letter sent to district court recalling mandate. Due to granting of certiorari on 6/13/05. [WD]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Docket No. 5:03-cv-00195-DNH-DRH

SUSAN HALLOCK, FERNCLIFF ASSOCIATES, INC. DOING BUSINESS AS MULTIMEDIA TECHNOLOGY CENTER, PLAINTIFFS

v.

ROBERT C. BONNER, RICHARD WILL, DENNIS P. HARRISON, MARGARET M. JORDAN, THOMAS VIRGILIO, UNKNOWN AGENTS OF UNITED STATES CUSTOMS AND TREASURY, UNKNOWN AGENTS OF UNITED STATES JUSTICE DEPARTMENT, UNKNOWN AGENTS OF UNITED STATES POSTAL SERVICE, UNKNOWN AGENTS OF UNITED STATES MARSHAL SERVICE, JOHN & JANE DOE 1-25, DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
02/13/2003	1	COMPLAINT filed; FILING FEE $ 150.00 RECEIPT # 66322; Service deadline 4/14/03 for John & Jane Doe 1-25, for UNA Agents of US Mar, for UNA Agents of USPS, for UNA Agents of US Jus, for UNA Agents of US Cus, for Thomas Virgilio, for Margaret M. Jordan, for Dennis P.

DATE	DOCKET NUMBER	PROCEEDINGS
		Harrison, for Richard Will, for Robert C. Bonner (jel) Additional attachment(s) added on 2/6/2004 (cbm,). (Entered: 02/13/2003)
		* * * * *
04/16/2003	10	Defts' MOTION to Dismiss, Hearing set for 10:00 on 6/13/03; Motion returnable before Judge Hurd in Utica, NY. ** This motion was received by the court on 5/14/03, but considered filed as of 4/16/03, pursuant to the CJRA Reporting requirements instituted March 1, 2000. ** (jt) Modified on 05/20/2003 Additional attachment(s) added on 2/10/2004 (cbm,). (Entered: 05/15/2003)
		* * * * *
05/01/2003	8	AMENDED COMPLAINT by Susan Hallock, Ferncliff Associates, Service deadline 6/30/03 for John & Jane Doe 1-25, for UNA Agents of US Mar, for UNA Agents of USPS, for UNA Agents of US Jus, for UNA Agents of US Cus, for Thomas

DATE	DOCKET NUMBER	PROCEEDINGS
		Virgilio, for Margaret M. Jordan, for Dennis P. Harrison, for Richard Will, for Robert C. Bonner , amends [1-1] complaint (fce) (Entered: 05/01/2003)
		* * * * *
05/14/2003	11	DECLARATION OF C. ROBERTS by Robert C. Bonner, Richard Will, Dennis P. Harrison, Margaret M. Jordan, Thomas Virgilio, UNA Agents of US Cus, UNA Agents of US Jus, UNA Agents of USPS, UNA Agents of US Mar, John & Jane Doe 1-25 Re: [10-1] motion to Dismiss (jt) Additional attachment(s) added on 2/10/2004 (cbm,). (Entered: 05/15/2003)
05/14/2003	12	MEMORANDUM by Robert C. Bonner, Richard Will, Dennis P. Harrison, Margaret M. Jordan, Thomas Virgilio, UNA Agents of US Cus, UNA Agents of US Jus, UNA Agents of USPS, UNA Agents of US Mar, John & Jane Doe 1-25 in support of [10-1] motion to Dismiss (jt) Additional attachment(s) added on 2/10/2004 (cbm,). (Entered: 05/15/2003)

DATE	DOCKET NUMBER	PROCEEDINGS
05/14/2003	13	MEMORANDUM by Susan Hallock, Ferncliff Associates in opposition to [10-1] motion to Dismiss (jt) Additional attachment(s) added on 2/10/2004 (cbm,). (Entered: 05/15/2003)
05/14/2003	14	REPLY by Robert C. Bonner, Richard Will, Dennis P. Harrison, Margaret M. Jordan, Thomas Virgilio, UNA Agents of US Cus, UNA Agents of US Jus, UNA Agents of USPS, UNA Agents of US Mar, John & Jane Doe 1-25 to response to [10-1] motion to Dismiss (jt) Additional attachment(s) added on 2/10/2004 (cbm,). (Entered: 05/15/2003)
05/22/2003	15	ANSWER by Robert C. Bonner, Richard Will, Dennis P. Harrison, Margaret M. Jordan, Thomas Virgilio, UNA Agents US Cus, UNA Agents of US Jus, UNA Agents of USPS, UNA of US Mar (Attorney Charles E. Roberts) to Amended Complaint (jmb) Additional attachment(s) added on 2/10/2004 (cbm,). (Entered: 05/27/2003)

DATE	DOCKET NUMBER	PROCEEDINGS
05/22/2003	16	ANSWER & AFFIRMATIVE DEFENSES: by Robert C. Bonner, Richard Will, Dennis P. Harrison, Margaret M. Jordan, Thomas Virgilio, UNA Agents US Cus, UNA Agents of US Jus, UNA Agents of USPS, UNA of US Mar (Attorney Charles E. Roberts) to Amended Complaint (jmb) Additional attachment(s) added on 2/6/2004 (cbm,). (Entered: 05/27/2003)
05/23/2003	17	MOTION by Robert C. Bonner, Richard Will, Dennis P. Harrison, Margaret M. Jordan, Thomas Virgilio, UNA Agents of US Cus, UNA Agents of US Jus, UNA Agents of USPS, UNA Agents of US Mar for Judgment on the Pleadings , Hearing set for 10:00 7/11/03 , Response Deadline 6/27/03 Motion returnable before Judge Hurd in Utica. (jt) Additional attachment(s) added on 2/10/2004 (cbm,). (Entered: 05/28/2003)
05/23/2003	18	MEMORANDUM by Robert C. Bonner, Richard Will, Dennis P. Harrison, Margaret M. Jordan,

DATE	DOCKET NUMBER	PROCEEDINGS
		Thomas Virgilio, UNA Agents of US Cus, UNA Agents of US Jus, UNA Agents of USPS, UNA Agents of US Mar in support of [17-1] motion for Judgment on the Pleadings (jt) Additional attachment(s) added on 2/10/2004 (cbm,). (Entered: 05/28/2003)
		* * * * *
05/30/2003	20	ORDER denying defts' original [10-1] motion to Dismiss as moot; pltfs' may Respond to Motion on or before 6/20/03 for [17-1] motion for Judgment on the Pleadings ; Motion Hearing is set for 10:00 am on 7/11/03 in Utica, NY before Judge Hurd, re: [17-1] motion for Judgment on the Pleadings. (signed by Judge David N. Hurd) (see) (Entered: 05/30/2003)
		* * * * *
06/23/2003	23	Letter REPLY dd 6/20/03 by Charles Roberts, AUSA for defts Robert C. Bonner, Richard Will, Dennis P. Harrison, Margaret M. Jordan, Thomas Virgilio, UNA Agents of US Cus, UNA Agents

DATE	DOCKET NUMBER	PROCEEDINGS
		of US Jus, UNA Agents of USPS, UNA Agents of US Mar to response to [17-1] motion for Judgment on the Pleadings. (see) Additional attachment(s) added on 2/10/2004 (cbm,). (Entered: 06/23/2003)
06/30/2003	24	Letter Brief dd 6/26/03 by Kenneth Sissel, Esq for the pltfs, in response to the USA's reply letter brief dd 6/20/03. (see) Additional attachment(s) added on 2/10/2004 (cbm,). (Entered: 07/01/2003)
		* * * * *
07/31/2003	29	MEMORANDUM by Ferncliff Associates, Susan Hallock in opposition to [17-1] motion for Judgment on the Pleadings (jt) Additional attachment(s) added on 2/5/2004 (see,). (Entered: 08/04/2003)
07/31/2003	30	RESPONSE to Reply to Response by Ferncliff Associates, Susan Hallock to [17-1] motion for Judgment on the Pleadings (jt) Additional attachment(s) added on 2/6/2004 (cbm,). (Entered: 08/04/2003)

DATE	DOCKET NUMBER	PROCEEDINGS
07/31/2003	31	REPLY by John & Jane Doe 1-25, UNA Agents of US Mar, UNA Agents of USPS, UNA Agents of US Jus, UNA Agents of US Cus, Thomas Virgilio, Margaret M. Jordan, Dennis P. Harrison, Richard Will, Robert C. Bonner to response to plntf's surreply to [17-1] motion for Judgment on the Pleadings (jt) Additional attachment(s) added on 2/6/2004 (cbm,). (Entered: 08/04/2003)
		* * * * *
08/20/2003	37	MEMORANDUM-DECISION and ORDER, that because pltfs' FTCA suit against the gov't was dismissed pursuant to FRCivP 12(b)(1) for lack of subject matter jurisdiction, and allowing pltfs to proceed does not offend the purpose of 276, the judgment bar statute does not bar pltfs' Bivens suit. Furthermore, under the liberal rules for notice pleading, pltfs have sufficiently stated a claim for which relief

DATE	DOCKET NUMBER	PROCEEDINGS
		may be granted; denying [17-1] motion for Judgment on the Pleadings. (signed by Judge David N. Hurd) (see) (Entered: 08/20/2003)
		* * * * *
09/22/2003	39	ORDER TO SHOW CAUSE: by Elizabeth Riker, AUSA for the defts to Amend the Court's [37-1] Memorandum-Decision and Order Motion Hearing set for 11:30 am on 10/3/03; Response Deadline 9/30/03. ORDERED that the above named pltfs appear before this Court at the US Courthouse, Utica, NY via telephone conference on 10/3/03 at 11:30 am or as soon as counsel can be heard, to show cause why the Court should not grant defts' motion for amendment of its Memorandum-Decision and Order dd 8/20/03; that a copy of this Order together with the supporting affidavit and Memorandum of Law be served on or before 9/24/03 by facsimile and Federal Express upon Kenneth M. Sissel, Esq, atty for the pltfs;

DATE	DOCKET NUMBER	PROCEEDINGS
		that any answering affidavits and/or opposition memoranda by pltfs herein shall be filed and served on or before 9/30/03. (Signed by Judge David N. Hurd) (see) (Entered: 09/22/2003)
09/22/2003	40	Defts' MEMORANDUM of Law by Elizabeth Riker, AUSA for the defts in support of the [39-1] motion to Amend the Court's [37-1] Memorandum-Decision and Order. (see) Additional attachment(s) added on 2/6/2004 (cbm,). (Entered: 09/22/2003)
09/22/2003	41	AFFIDAVIT by Elizabeth Riker, AUSA for the defts, Re: In Support of defts' [39-1] motion to Amend the Court's [37-1] Memorandum-Decision and Order. (see) Additional attachment(s) added on 2/6/2004 (cbm,). (Entered: 09/22/2003)
09/30/2003	42	Pltfs' MEMORANDUM of LAW by Kenneth Sissel, Esq for Ferncliff Associates and Susan Hallock in opposition to [39-1] mo

DATE	DOCKET NUMBER	PROCEEDINGS
		tion to Amend the [37-1] Memorandum-Decision and Order. (see) Additional attachment(s) added on 2/6/2004 (cbm,). (Entered: 09/30/2003)
		* * * * *
10/06/2003	46	ORDER denying defts' [39-1] motion to Amend the Court's [37-1] Memorandum-Decision and Order. (signed by Judge David N. Hurd) Date Entered: 10/6/03 (see) (Entered: 10/06/2003)
10/10/2003	47	NOTICE OF INTERLOCUTORY APPEAL of [37- 1] order by John & Jane Doe 1-25, UNA Agents of US Mar, UNA Agents of USPS, UNA Agents of US Jus, UNA Agents of US Cus, Thomas Virgilio, Margaret M. Jordan, Dennis P. Harrison, Richard Will, Robert C. Bonner FILING FEE $ wv Appeal record due on 11/9/03 (jt) Additional attachment(s) added on 2/6/2004 (cbm,). (Entered: 10/15/2003)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
01/27/2005	66	MANDATE of U S C A: it is ordered that the Order of the district court is hereby Affirmed, therefore the # 47 Notice of Interlocutory Appeal, filed by Dennis P. Harrison, Margaret M. Jordan, Robert C. Bonner, Richard Will, Thomas Virgilio, Unknown Agents of United States Customs and Treasury, Unknown Agents of United States Justice Department, Unknown Agents of United States Postal Service, Unknown Agents of United States Marshal Service, John & Jane Doe 1-25 is dismissed. (Attachments: # 1 Slip Opinion) (Issued as a Mandate on 1/19/05) (jmb) (Entered: 02/03/2005)
		* * * * *
06/20/2005	78	NOTICE to the District Court that a Writ of Certiorari has been granted as of 6/6/2005, therefore, the USCA is recalling the 66 USCA Mandate issued on 1/19/2005. (see) (Entered: 06/20/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
06/21/2005		Document # 66 USCA Mandate has been returned to the US Court of Appeals for the Second Circuit as requested in document # 78 Notice of granting of a Writ of Certiorari. (jmb) (Entered: 06/21/2005)

* * * * *

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT, STATE OF NEW YORK

File No. 03-CV-0195 DNH-DRH

SUSAN HALLOCK, FERNCLIFF ASSOCIATES, INC. D/B/A MULTIMEDIA TECHNOLOGY CENTER, PLAINTIFFS

v.

ROBERT C. BONNER, RICHARD WILL, DENNIS P. HARRISON, MARGARET M. JORDAN, THOMAS VIRGILIO, UNKNOWN AGENTS OF UNITED STATES CUSTOMS AND TREASURY, UNKNOWN AGENTS OF UNITED STATES JUSTICE DEPARTMENT, UNKNOWN AGENTS OF UNITED STATES POSTAL SERVICE, UNKNOWN AGENTS OF UNITED STATES MARSHAL SERVICE, JOHN & JANE DOE 1-25, DEFENDANTS

Filed: Feb. 13, 2003

COMPLAINT FOR DAMAGES

COME NOW the Plaintiffs by and through their undersigned attorney and hereby file this Complaint against the Defendants by showing as follows:

1.

This action is brought pursuant to *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), *Davis* v. *Passman*, 442 U.S. 228 (1979) and Common Law. The court has

jurisdiction over this action pursuant to 28 U.S.C. §§1331 and 2201.

2.

Pursuant to Rule 4 FRCP and New York State Consolidated Laws, Civil Practice Law and Rules, Article 3, Defendant, Robert C. Bonner, can be served at Customs Headquarters, 1300 Pennsylvania Ave., NW, Washington, D.C. 20229.

3.

Pursuant to Rule 4 FRCP and New York State Consolidated Laws, Civil Practice Law and Rules, Article 3, Defendant, Richard Will, can be served at United States Customs Service, 445 Broadway, Albany, NY 12207.

4.

Pursuant to Rule 4 FRCP and New York State Consolidated Laws, Civil Practice Law and Rules, Article 3, Defendant, Dennis P. Harrison can be served at US Customs, 19 St. Johns Highway, Rouses Point, NY 12979 or at 1 Crestview Way, Rouses Point, NY 12979-1430.

5.

Pursuant to Rule 4 FRCP and New York State Consolidated Laws, Civil Practice Law and Rules, Article 3, Defendant, Margaret M. Jordan can be served at US Customs, Room 746, Leo O'Brien Federal Bldg., Albany, NY 12207.

6.

Pursuant to Rule 4 FRCP and New York State Consolidated Laws, Civil Practice Law and Rules, Article 3, Defendant, Thomas Virgilio can be served at

US Customs, Room 746, Leo O'Brien Federal Bldg., Albany, NY 12207 or at 28 Redfield Park, Clifton Park, NY 12065.

7.

Service upon Unknown Named Agents of United States Customs and Treasury, Unknown Named Agents of United States Justice Department, Unknown Named Agents of the United States Postal Service, and Unknown Named Agents of United States Marshall Service, and John and Jane Doe, 1 through 25 will be perfected upon specific identification of such Defendants in accordance in law.

8.

Richard J. Hallock and Susan C. Hallock resided at 194 Ferncliff Road, Village of Mohawk, County of Herkimer, in the State of New York at the time this cause of action accrued. Ferncliff Associates, Inc., d/b/a Multimedia Technology Center (Ferncliff), operated from offices located at 194 Ferncliff Road, Village of Mohawk, County of Herkimer, in the State of New York at the time this cause of action accrued. Ferncliff is a corporation authorized to do business in the State of New York. Susan Hallock is President and 100% stockholder of Ferncliff. A substantial part of the events or omissions giving rise to this claim occurred in the Northern District of New York. Pursuant to 28 U.S.C. § 1391, venue is therefore proper in this Court. Service may be perfected pursuant to F.R.C.P. 4(i)(2).

9.

On June 8, 2000, at approximately 9:00 A.M., under authority of a Search Warrant from the United Stated District Court, Northern District of New York, signed by Hon. David E. Peebles, United States Magistrate

Judge, Defendants Margaret M. Jordan, Thomas Virgilio, Dennis Harrison and other persons from the United States Customs, United States Treasury, United States Department of Justice, United States Postal Service, and United States Marshals Service, undertook to search the premises located at 194 Ferncliff Road, Mohawk, New York, 13407. The nature of the Search Warrant was to seize all property, contraband, instrumentalities, fruits or evidence of violation of Title 18, United States Code, §2225 and §2252A.

Neither the Hallocks nor the Plaintiffs have ever violated said Act. No action was ever brought against Plaintiffs, and so far as it known by this suit action, the matter was never presented to a Grand Jury for prosecutorial consideration or action. Defendants seized property which was the intellectual property of Plaintiffs and was not evidence of a crime as Plaintiffs were not involved in child pornography at any time or at any place.

10.

Above named Defendants seized all computer equipment, computer software, computer data, and computer hard disk drives from 194 Ferncliff Road. Additionally by nature of their being stored on computer hard disk drives, seized from the property, all Computer Software Intellectual Property, all computerized Proprietary Computer Software Design Documents, all Computerized Personal Records, all Computerized Business Records, all Computerized Accounts, Client Files, and Business as well as Technological Trade Secrets belonging to Plaintiffs, both primary and archival backups, were also seized.

11.

On September 11, 2000 and September 15, 2000, two proposed agreements were sent to Thomas F. Shannon, Esq. from the office of United States Attorney for the Northern District of New York. The signature lines bear the names of Daniel J. French, United States Attorney, Brenda K. Sannes, Assistant U.S. Attorney, Thomas Shannon, Esq., Attorney for Richard Hallock, and Richard Hallock. Both agreements contain the following language:

> "A. The computer data images obtained by the United States Customs Service from the computer and hard drives (the "images") are a complete and accurate *reproduction* [emphasis added] of the data that were stored on the computers at the time that they were seized on June 8, 2000;"

12.

On December 21, 2000 at approximately 11:00 A.M., Defendant, Dennis P. Harrison met with Richard Hallock on a street near the United States Customs Office in Albany, New York, and there Defendant Harrison transferred all computer equipment and computer hard drives seized from 194 Ferncliff Road from his vehicle to the Plaintiffs. Plaintiffs were completely without the opportunity to verify operability of the returned equipment or to determine if in fact all seized property had been returned.

13.

From June 8, 2000 to December 21, 2000, said property was in the sole custody and control of all Defendants.

14.

A. On December 21, 2000, at approximately 3:00 P.M., Richard Hallock, upon performing a full and complete review and inspection of the seized property returned by Defendant Harrison, discovered that on the 9 computer systems originally seized from 194 Ferncliff Road, Mohawk, New York, 4 had been damaged to the extent of being totally unusable. Of these, 1 computer belonging to a client of Ferncliff Associates, Inc. was returned to the client. The other 3 damaged computer systems belonged to Plaintiffs, their loss necessitating the end of normal business operations of Plaintiffs.

B. It was also discovered that of the computer hard disk drives seized, 5 had been damaged to the point of complete loss of all stored data. Stored on the hard drive disk drives had been all Computer Software Intellectual Property, all computerized Proprietary Computer Software Design Documents, all Computerized Personal Records, all Computed Business Records, all Computerized Accounts, Client Files, and Business as well as Technological Trade Secrets belonging to Plaintiffs, both primary and archival backup copies. After submission to Action Front Data Recovery Labs said data was determined to be totally destroyed.

C. It is Plaintiffs' assertion that Defendants caused total and permanent damage to the computer equipment resulting in the complete loss of all stored computer data as well as loss of computer equipment, all critical to the continued business operations of Plaintiffs. Through misuse, negli-

gent and improper handling, negligent and improper storage, negligent and improper transport, environmentally unsafe packaging and perhaps intent, Defendants destroyed property belonging to Plaintiffs while that property was in their protective care and responsibility and the property has been unrecoverable for all time.

15.

Furthermore, Defendants failed to follow established standards and procedures, which failure proximately caused the damages to Plaintiffs for which recovery of damages is sought herein.

16.

As a direct and proximate result of the acts of negligence committed by Defendants, Plaintiffs sustained serious irretrievable, ongoing pecuniary damages.

17.

Count I

Liability of Defendants for Damages to Personal Property under Common Law

Defendants have destroyed and/or converted the intellectual property belonging to Plaintiffs and destroyed the income stream derived from same. As a legal result of the actions of Defendants, Plaintiffs have suffered damages.

18.

Count II

Violation of Amendment V of the Constitution of the United State of America

Defendants violated Plaintiffs' constitutional rights as provided by Amendment V of the Constitution of the United States of America by depriving Plaintiffs of their intellectual property, without due process, and by destroying the income stream generated by same.

19.

Plaintiffs demand a trial by Jury.

20.

In the event that this Honorable Court finds that there is a want of jurisdiction, Plaintiffs pray that this court shall, in the interest of justice, transfer this action to any other court in which this action could have been brought at the time it was filed pursuant to 28 U.S.C. §1631.

WHEREFORE, Plaintiffs demand judgment for special damages in the amount of $4,421,700.00, punitive damages, general damages, and damages for Plaintiff Hallock for pain and suffering as measured by the

enlightened conscience of the finder of fact, plus costs, fees, and other expenses of this action for such other relief as the Court may deem necessary and proper.

Respectfully submitted,

/s KENNETH M. SISSEL
KENNETH M. SISSEL
Georgia State
Bar No. 649406
Attorney for Plaintiffs
Bar Roll No. 503056

Kenneth M. Sissel
Attorney at Law
746 Pleasant Hill Road
Lilburn, Georgia 30047
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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT, STATE OF NEW YORK

File No. 03-CV-0195 DNH-DRH

SUSAN HALLOCK, FERNCLIFF ASSOCIATES, INC. D/B/A MULTIMEDIA TECHNOLOGY CENTER, PLAINTIFFS

v.

ROBERT C. BONNER, RICHARD WILL, DENNIS P. HARRISON, MARGARET M. JORDAN, THOMAS VIRGILIO, UNKNOWN AGENTS OF UNITED STATES CUSTOMS AND TREASURY, UNKNOWN AGENTS OF UNITED STATES JUSTICE DEPARTMENT, UNKNOWN AGENTS OF UNITED STATES POSTAL SERVICE, UNKNOWN AGENTS OF UNITED STATES MARSHAL SERVICE, JOHN & JANE DOE 1-25, DEFENDANTS

Filed: May 1, 2003

PLAINTIFFS' FIRST AMENDED COMPLAINT FOR DAMAGES

COME NOW the Plaintiffs' by and through their undersigned attorney and hereby file this Plaintiffs' First Amended Complaint for Damages against the Defendants by showing as follows:

1.

This action is brought pursuant to *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and *Davis* v. *Passman*,

422 U.S. 228 (1979). The court has jurisdiction over this action pursuant to 28 U.S.C. §§1331 and 2201.

2.

Pursuant to Rule 4 FRCP and New York State Consolidated Laws, Civil Practice Law and Rules, Article 3, Defendant, Robert C. Bonner, can be served at Customs Headquarters, 1300 Pennsylvania Ave., NW, Washington, D.C. 20229.

3.

Pursuant to Rule 4 FRCP and New York State Consolidated Laws, Civil Practice Law and Rules, Article 3, Defendant, Richard Will, can be served at United States Customs Service, 445 Broadway, Albany, NY 12207.

4.

Pursuant to Rule 4 FRCP and New York State Consolidated Laws, Civil Practice Law and Rules, Article 3, Defendant, Dennis P. Harrison can be served at US Customs, 19 St. Johns Highway, Rouses Point, NY 12979 or at 1 Crestview Way, Rouses Point, NY 12979-1430.

5.

Pursuant to Rule 4 FRCP and New York State Consolidated Laws, Civil Practice Law and Rules, Article 3, Defendant, Margaret M. Jordan can be served at US Customs House, Hoboken, NJ 07030.

6.

Pursuant to Rule 4 FRCP and New York State Consolidated Laws, Civil Practice Law and Rules, Article 3, Defendant, Thomas Virgilio can be served at Customs

Headquarters, 1300 Pennsylvania Avenue, NW, Washington, DC 20229.

7.

Service upon Unknown Named Agents of United States Customs and Treasury, Unknown Named Agents of United States Justice Department, Unknown Named Agents of the United States Postal Service, and Unknown Named Agents of United States Marshall Service, and John and Jane Doe, 1 through 25 will be perfected upon specific identification of such Defendants in accordance with law.

8.

Richard J. Hallock and Susan C. Hallock resided at 194 Ferncliff Road, Village of Mohawk, County of Herkimer, in the State of New York at the time this cause of action accrued. Ferncliff Associates, Inc., d/b/a Mutlimedia Technology Center (Ferncliff), operated from offices located at 194 Ferncliff Road, Village of Mohawk, County of Herkimer, in the State of New York at the time this cause of action accrued. Ferncliff is a corporation authorized to do business in the State of New York. Susan Hallock is President and 100% stockholder of Ferncliff. A substantial part of the events or omissions giving rise to this claim occurred in the Northern District of New York. Venue is proper in this Court. Service may be perfected pursuant to F.R.C.P. 4(i)(2).

9.

On June 8, 2000, at approximately 9:00 A.M., under authority of a Search Warrant from the United Stated District Court, Northern District of New York, signed by Hon. David E. Peebles, United States Magistrate Judge, Defendants Margaret M. Jordan, Thomas

Virgilio, Dennis Harrison and other persons from the United States Customs, Untied States Treasury, United Stated Department of Justice, United States Postal Service and United States Marshals Service, undertook to search the premises located at 194 Ferncliff Road, Mohawk, New York, 13407. The nature of the Search Warrant was to seize all property, contraband, instrumentalities, fruits or evidence of violation of Title 18, United States Code, §2225 and §2252A.

Neither the Hallocks nor the Plaintiffs have ever violated said Act. No action was ever brought against Plaintiffs, and so far as it known by this suit action, the matter was never presented to a Grand Jury for prosecutorial consideration or action. Defendants seized property which was the intellectual property of Plaintiffs and was not evidence of a crime as Plaintiffs were not involved in child pornography at any time or at any place.

10.

Above named Defendants seized all computer equipment, computer software, computer data, and computer hard disk drives from 194 Ferncliff Road. Additionally by nature of their being stored on computer hard disk drives, seized from the property, all Computer Software Intellectual Property, all computerized Proprietary Computer Software Design Documents, all Computerized Personal Records, all Computerized Business Records, all computerized Accounts, Client Files, and Business as well as Technological Trade Secrets belonging to Plaintiffs, both primary and archival backups, were also seized.

11.

On September 11, 2000 and September 15, 2000, two proposed agreements were sent to Thomas F. Shannon, Esq. from the office of United States Attorney for the Northern District of New York. The signature lines bear the names of Daniel J. French, United States Attorney, Brenda K. Sannes, Assistant U.S. Attorney, Thomas Shannon, Esq., Attorney for Richard Hallock, and Richard Hallock. Both agreements contain the following language:

> "A. The computer data images obtained by the United States Customs Service from the computer and hard drives (the "images") are a complete and accurate *reproduction* [emphasis added] of the data that were stored on the Computers at the time that they were seized on June 8, 2000;"

12.

On December 21, 2000 at approximately 11:00 A.M., Defendant, Dennis P. Harrison met with Richard Hallock on a street near the United States Customs Office in Albany, New York, and there Defendant Harrison transferred all computer equipment and computer hard drives seized from 194 Ferncliff Road from his vehicle to the Plaintiffs. Plaintiffs were completely without the opportunity to verify operability of the returned equipment or to determine if in fact all seized property had been returned.

13.

From June 8, 2000 to December 21, 2000, said property was in the sole custody and control of all Defendants.

14.

A. On December 21, 2000, at approximately 3:00 P.M., Richard Hallock, upon performing a full and complete review and inspection of the seized property returned by Defendant Harrison, discovered that of the 9 computer systems originally seized from 194 Ferncliff Road, Mohawk, New York, 4 had been damaged to the extent of being totally unusable. Of these, 1 computer belonging to a client of Ferncliff Associates, Inc. was returned to the client. The other 3 damaged computer systems belonged to Plaintiffs, their loss necessitating the end of normal business operations of Plaintiffs.

B. It was also discovered that of the computer hard disk drives seized, 5 had been damaged to the point of complete loss of all stored data. Stored on the hard drive disk drives had been all Computer Software Intellectual Property, all computerized Proprietary Computer Software Design Documents, all Computerized Personal Records, all Computed Business Records, all Computerized Accounts, Client Files, and Business as well as Technological Trade Secrets belonging to Plaintiffs, both primary and archival backup copies. After submission to Action Front Data Recovery Labs said data was determined to be totally destroyed.

C. It is Plaintiffs' assertion that Defendants intentionally caused total and permanent damage to the computer equipment resulting in the complete loss of all stored computer data as well as loss of computer equipment, all critical to the continued business operations of Plaintiffs.

15.

As a direct and proximate result of the acts committed by Defendants, Plaintiffs sustained serious irretrievable, ongoing pecuniary damages.

16.

Count I

Violations of Amendment V of the Constitution of the United States of America

Defendants violated Plaintiffs' constitutional rights as provided by Amendment V of the Constitution of the United States of America by intentionally depriving Plaintiffs of their intellectual property, without due process, and by destroying the income stream generated by same.

17.

Plaintiffs demand a trial by Jury.

18.

In the event that this Honorable Court finds that there is a want of jurisdiction, Plaintiffs pray that this court shall, in the interest of justice, transfer this action to any other court in which this action could have been brought at the time it was filed pursuant to 28 U.S.C. §1631.

WHEREFORE, Plaintiffs demand judgment for special damages in the amount of $4,421,700.00, punitive damages, general damages, and damages for Plaintiff Hallock for pain and suffering as measured by the enlightened conscience of the finder of fact, plus costs,

fees, and other expenses of this action for such other relief as the Court may deem necessary and proper.

Respectfully submitted,

/s KENNETH M. SISSEL
KENNETH M. SISSEL
Georgia State
Bar No. 649406
Attorney for Plaintiffs
Bar Roll No. 503056

Kenneth M. Sissel
Attorney at Law
746 Pleasant Hill Road
Lilburn, Georgia 30047
404/325-1244
Fax: 404/315-7568

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Case Number: 1:02-CV-942

SUSAN HALLOCK, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA,
DEFENDANT

Filed: Mar. 24, 2003

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the First Restated and Amended Complaint for Damages is DISMISSED pursuant to the Order of Judge David N. Hurd dated 3/21/03.

March 24, 2003 — Date

LAWRENCE K. BAERMAN — Clerk

/s/
(By) Deputy Clerk Patricia L. Maguire

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT, STATE OF NEW YORK

No. 03-CV-195

SUSAN HALLOCK, FERNCLIFF ASSOCIATES, INC.
DBA MULTIMEDIA TECHNOLOGY CENTER, PLAINTIFFS

v.

ROBERT C. BONNER, RICHARD WILL, DENNIS P.
HARRISON, MARGARET M. JORDAN, THOMAS VIRGILIO,
UNKNOWN AGENTS OF UNITED STATES CUSTOMS AND
TREASURY, UNKNOWN AGENTS OF UNITED STATES
JUSTICE DEPARTMENT, UNKNOWN AGENTS OF UNITED
STATES POSTAL SERVICE, UNKNOWN AGENTS OF
UNITED STATES MARSHAL SERVICE, AND JOHN & JANE
DOE 1-25, DEFENDANTS

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DAVID N. HURD
United States District Judge

ORDER

Defendants have moved pursuant to an Order to Show Cause (Doc. No. 39) to amend the Memorandum Decision and Order of August 20, 2003 (Doc. No. 37) to certify it for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Plaintiffs oppose.

Oral argument was heard on October 3, 2003. Decision was reversed.

Defendants have failed to cite even one case–Circuit or District Court–in which a prior FTCA judgment dismissing a complaint for lack of subject matter jurisdiction would bar a subsequent *Bivens* action. Therefore, the defendants have failed to establish an essential element of certification, to wit: "that such an order is substantial ground for difference of opinion." 28 U.S.C. § 1292(b).

This would not, of course, bar an appeal as of right under the collateral order doctrine, if it is applicable.

Therefore, it is ORDERED that the Defendant's motion is DENIED.

IT IS SO ORDERED

/s/
United States District Judge

Date: October 6, 2003
Utica, New York.

Supreme Court, U.S.
FILED
AUG 22 2005
OFFICE OF THE CLERK

No. 04-1332

In the Supreme Court of the United States

RICHARD WILL, ET AL., PETITIONERS

v.

SUSAN HALLOCK, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. The Federal Tort Claims Act (FTCA)'s judgment bar, 28 U.S.C. 2676, provides that "[t]he judgment in an action under section 1346(b) of this title," *i.e.*, the statutory provision that grants subject matter jurisdiction to federal district courts over FTCA cases, "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." The question presented by the petition is:

Whether a final judgment in an action brought under Section 1346(b) dismissing the claim on the ground that relief is precluded by one of the FTCA's exceptions to liability, 28 U.S.C. 2680, bars a subsequent action by the claimant against the federal employees whose acts gave rise to the FTCA claim.

2. In addition, in its order granting certiorari in this case (125 S. Ct. 2547), the Court directed the parties to brief and argue the following question:

Did the court of appeals have jurisdiction over the interlocutory appeal of the district court's order denying a motion to dismiss under the FTCA's judgment bar, 28 U.S.C. 2676.

PARTIES TO THE PROCEEDING

Petitioners are Richard Will, Dennis P. Harrison, Margaret M. Jordan, Thomas Virgilio, and Robert C. Bonner.*

Respondents are Susan Hallock and Ferncliff Associates, Inc., d/b/a Multimedia Technology Center.

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* The court of appeals directed that Robert C. Bonner "should be dismissed from this action" because he did not hold office at the time of the events at issue in the litigation. Pet. App. 2a n.1. Because the district court has not yet entered an order of dismissal, he joins in the petition as a protective matter. Additional John and Jane Doe defendants were named in the complaint, but no defendants other than those identified in the text were served.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Statement 2
Summary of argument 8
Argument 12
I. The district court's denial of petitioners' statutory right to be free from suit on respondents' claims was immediately appealable under the collateral order doctrine 14
A. This Court has recognized the immediate appealability of district court orders that finally resolve important claims of right and would otherwise be effectively unreviewable, such as a government official's claim to immunity from suit for his official acts 14
B. Congress's specification in Section 2676 that a prior Federal Tort Claims Act judgment is a "complete bar to any action" against the individual government employee creates a right to be free from suit that triggers a right of immediate appeal 17
II. The judgment bar applies to a prior FTCA judgment based on one of the Act's exceptions in Section 2680 25
A. Under the plain language of the judgment bar, the prior judgment in respondents' FTCA suit bars their present action against the individual government employees whose conduct was there at issue 25

Table of Contents—Continued: Page

B. Application of the judgment bar in this case is confirmed by this Court's construction of nearly identically worded provisions of the FTCA 31
1. Section 2679(b) 32
2. Section 2679(a) 34
C. The court of appeals' holding that a dismissal based on a Section 2680 exception is outside the scope of Section 2676 is inconsistent with the structure of the Act and the nature of the exceptions in Section 2680 38
1. The court of appeals' premise of a clear distinction between jurisdictional and other FTCA defenses is at odds with the structure of the act 39
2. The substantive nature of Section 2680's exceptions is further evidenced by the nature of the inquiry they entail 43
Conclusion 49
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651 (1977) 14, 15, 16, 18,19
ALX El Dorodo, Inc. v. *Southwest Sav. & Loan Ass'n/FSLIC*, 36 F.3d 409 (5th Cir. 1994) 48
Andrews v. *United States*, 121 F.3d 1430 (11th Cir. 1997) 45

Cases—Continued: Page

Andrus v. *Glover Constr. Co.*, 446 U.S. 608 (1980) 32
Aragon v. *United States*, 146 F.3d 819 (10th Cir. 1998) 44
Arevalo v. *Woods*, 811 F.2d 487 (9th Cir. 1987) ... 26, 28
Audio Odyssey, Ltd. v. *United States*, 255 F.3d 512 (8th Cir. 2001) 35
Begay v. *United States*, 768 F.2d 1059 (9th Cir. 1985) 44
Behrens v. *Pelletier*, 516 U.S. 299 (1996) 14, 18
Bell v. *United States*, 127 F.3d 1226 (10th Cir. 1997) 44, 48
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 5
Block v. *North Dakota*, 461 U.S. 273 (1983) 42
Brown v. *United States*, 851 F.2d 615 (3d Cir. 1988) 7, 20
Catlin v. *United States*, 324 U.S. 229 (1945) 14
Cohen v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) 7, 8, 14, 15
Coleman v. *United States*, 91 F.3d 820 (6th Cir. 1996) 24
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) 15, 19
Dalehite v. *United States*, 346 U.S. 15 (1953) 12, 13, 21
Davric Maine Corp. v. *USPS*, 238 F.3d 58 (1st Cir. 2001) 36

Cases—Continued: Page

Dickinson v. *Petroleum Conversion Corp.*, 338 U.S. 507 (1950) 23
Digital Equip. Corp. v. *Desktop Direct, Inc.*, 511 U.S. 863 (1994) 14, 16, 18, 23
Dombrowski v. *Eastland*, 387 U.S. 82 (1967) 17
FDIC v. *Meyer*, 510 U.S. 471 (1994) 11, 34, 35, 36
Farmer v. *Perrill*, 275 F.3d 958 (10th Cir. 2001) 7, 20, 21, 27, 28
Flohr v. *Mackovjak*, 84 F.3d 386 (11th Cir. 1996) 24
Franklin Sav. Corp. v. *United States*, 180 F.3d 1124 (10th Cir.), cert. denied, 528 U.S. 964 (1999) 36, 47
Gasho v. *United States*, 39 F.3d 1420 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995) 22, 27, 28, 46
Gillespie v. *United States Steel Corp.*, 379 U.S. 148 (1964) 23
Gould Elecs. Inc. v. *United States*, 220 F.3d 169 (3d Cir. 2000) 43
Green v. *United States*, 355 U.S. 184 (1957) 16
Gregoire v. *Biddle*, 177 F.2d 579 (2d Cir. 1949) 17
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 22
Hartford Underwriters Ins. Co. v. *Union Planters Bank, N.A.*, 530 U.S. 1 (2000) 30
Helstoski v. *Meanor*, 442 U.S. 500 (1979) 16, 17

Cases—Continued: Page

Hoosier Bancorp, Inc. v. *Rasmussen*, 90 F.3d 180 (7th Cir. 1996) 27, 28
Hughes Aircraft Co. v. *Jacobson*, 525 U.S. 432 (1999) 30
Hughes Aircraft Co. v. *United States ex rel. Schumer*, 520 U.S. 939 (1997) 41
Jamison v. *Wiley*, 14 F.3d 222 (4th Cir. 1994) 24
Jerome Stevens Pharms., Inc. v. *FDA*, 402 F.3d 1249 (D.C. Cir. 2005) 47
Johnson v. *Smithsonian Inst.*, 189 F.3d 180 (2d Cir. 1999) 42
Kelly v. *United States*, 241 F.3d 755 (9th Cir. 2001) 45
Kimbro v. *Velten*, 30 F.3d 1501 (D.C. Cir. 1994), cert. denied 515 U.S. 1145 (1995) 24
Kosak v. *United States*, 465 U.S. 848 (1984) 41, 48
Lamie v. *United States Trustee*, 540 U.S. 526 (2004) 30
Leocal v. *Ashcroft*, 125 S. Ct. 377 (2004) 31, 38
Makarova v. *United States*, 201 F.3d 110 (2d Cir. 2000) 43
McHugh v. *University of Vt.*, 966 F.2d 67 (2d Cir. 1992) 24
Melo v. *Hafer*, 13 F.3d 736 (3d Cir. 1994) 24
Mercado Del Valle v. *United States*, 856 F.2d 406 (1st Cir. 1988) 48
Millares Guiraldes de Tineo v. *United States*, 137 F.3d 715 (2d Cir. 1998) 42

Cases—Continued: Page

Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 7, 15, 18, 19, 20, 22, 23
Molzof v. *United States*, 502 U.S. 301 (1992) 40
Nixon v. *Fitzgerald*, 457 U.S. 731 (1982) 16
Pelletier v. *Federal Home Loan Bank*, 968 F.2d 865 (9th Cir. 1992) 24
Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) 41
Puerto Rico Aqueduct & Sewer Auth. v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) 9, 15, 16, 20
Rayonier Inc. v. *United States*, 352 U.S. 315 (1957) 12
Republic of Austria v. *Altmann*, 541 U.S. 677 (2004) 41
Rodriguez v. *Handy*, 873 F.2d 814 (5th Cir. 1989) 28, 29
Rodriquez v. *Sarabyn*, 129 F.3d 760 (5th Cir. 1997) 24
Ruhrgas AG v. *Marathon Oil Co.*, 526 U.S. 574 (1999) 44
Serra v. *Pichardo*, 786 F.2d 237 (6th Cir.), cert. denied, 479 U.S. 826 (1986) 26, 28, 29
Smith v. *Marshall*, 885 F.2d 650 (9th Cir. 1989), rev'd, 499 U.S. 160 (1991) 32, 33
Smith v. *United States*, 507 U.S. 197 (1993) 48
Stuto v. *Fleishman*, 164 F.3d 820 (2d Cir. 1999) 48
Taboas v. *Mlynczak*, 149 F.3d 576 (7th Cir. 1998) 24

Cases—Continued: Page

United States v. *Gaubert*, 499 U.S. 315 (1991) .. 40, 47
United States v. *Gilman*, 347 U.S. 507 (1954) 21, 22, 26
United States v. *Kubrick*, 444 U.S. 111 (1979) 42
United States v. *Mottaz*, 476 U.S. 834 (1986) 42
United States v. *Smith*, 499 U.S. 160 (1991) 10, 11, 32, 33
United States v. *Varig Airlines*, 467 U.S. 797 (1984) 40, 45
Welch v. *United States*, 409 F.3d 646 (4th Cir. 2005) 47
Westfall v. *Erwin*, 484 U.S. 292 (1988) 45
Whisnant v. *United States*, 400 F.3d 1177 (9th Cir. 2005) 47

Constitution, statutes and rules:

U.S. Const.:
Art. I, § 6, Cl. 1 (Speech or Debate Clause) 9, 16, 19, 20
Amend. V:
Double Jeopardy Clause 15, 19, 20
Due Process Clause 5
Amend. XI 16
All Writs Act, 28 U.S.C. 1651 6
Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 23

Statutes and rules—Continued: Page

Federal Tort Claims Act:
28 U.S.C. 1346(b) ..... *passim*
28 U.S.C. 1346(b)(1) 2, 39, 42, 1a
28 U.S.C. 2671 *et seq.* 2, 39
28 U.S.C. 2671-2680 ..... 2, 3, 12, 40
28 U.S.C. 2672 ..... 21, 2a
28 U.S.C. 2674 ..... 12, 39, 42, 43, 3a
28 U.S.C. 2676 ..... *passim*
28 U.S.C. 2679(a) 11, 31, 32, 34, 35, 36, 37, 3a
28 U.S.C. 2679(b) 31, 32, 33, 34, 37, 4a
28 U.S.C. 2679(b)(1) 5, 10, 11, 24, 32, 33, 34, 4a
28 U.S.C. 2679(b)(2) 24, 32, 4a
28 U.S.C. 2679(b)(2)(A) 32
28 U.S.C. 2679(d) 33, 5a
28 U.S.C. 2679(d)(1) 24, 33, 5a
28 U.S.C. 2679(d)(2) 24, 33, 6a
28 U.S.C. 2679(d)(3) 24, 33, 6a
28 U.S.C. 2679(d)(4) 11, 24, 33, 34, 39, 7a
28 U.S.C. 2680 ..... *passim*
28 U.S.C. 2680(a) 40, 45, 47, 48, 7a
28 U.S.C. 2680(c) 3, 4, 25, 37, 46, 48, 8a
28 U.S.C. 2680(k) 32, 48
28 U.S.C. 2401(b) 42
28 U.S.C. 1291 ..... 14, 18, 24, 49
28 U.S.C. 1292(b) 6, 18

Rules—Continued: Page

Fed. R. Civ. P.:
Rule 12(b)(1) 3, 5, 46, 47
Rule 12(b)(6) 3, 5, 47, 48
Rule 54(a) 26
Rule 54(b) 26
Rule 56 44
Rule 58 26

Miscellaneous:

Alexander Holtzoff, *Report on Proposed Federal Tort Claims Bill* (1931) 40
Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary, 77th Cong., 2d Sess. (1942) 21
Charles Alan Wright et al., *Federal Practice and Procedure* (1995) 26

In the Supreme Court of the United States

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RICHARD WILL, ET AL., PETITIONERS

v.

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ON WRIT OF CERTIORARI
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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 387 F.3d 147. The opinions of the district court (Pet. App. 18a-26a, 27a-40a) are reported at 281 F. Supp. 2d 425 and 253 F. Supp. 2d 361.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 2004. A petition for rehearing en banc was denied on January 4, 2005 (J.A. 4). The petition for a writ of certiorari was filed on April 4, 2005, and was granted on June 6, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Tort Claims Act (FTCA or Act), 28 U.S.C. 1346(b), 2671 *et seq.*, are set forth at App., *infra*, 1a-9a.

STATEMENT

1. The judgment bar in the Federal Tort Claims Act protects a federal employee from suit where the claimant has brought an action against the United States under the FTCA, that action has gone to judgment, and the suit against the employee concerns the same subject matter. The judgment bar provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676.

Section 1346(b) is the jurisdictional provision of the FTCA. It provides the district courts with "exclusive jurisdiction" over tort claims against the United States. Specifically, Section 1346(b) provides that "[s]ubject to the provisions of chapter 171 of this title," the district courts "shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). Chapter 171 of Title 28 contains the various procedural and liability provisions of the

FTCA, as well as the exceptions to the FTCA. See 28 U.S.C. 2671-2680.

2. In June 2000, federal officers seized several computers from respondents pursuant to a lawful warrant obtained in connection with a child-pornography investigation. Pet. App. 28a. No criminal charges were filed against respondents, and the seized computers were returned to them on December 21, 2000. *Id.* at 28a-29a & n.1.

3. In July 2002, respondents filed an FTCA action against the United States in the United States District Court for the Northern District of New York. In their complaint, respondents alleged that some of the computers seized in the government's investigation were damaged while in the government's custody, and that the resulting loss of personal and business records caused respondents to close their business. Pet. App. 29a. The sole basis for jurisdiction asserted in respondents' complaint against the United States was 28 U.S.C. 1346(b), the jurisdictional provision of the FTCA. Pet. App. 27a. The complaint sought money damages against the United States for injury or loss to respondents' property caused by the allegedly negligent acts of employees of the United States Customs Service and other governmental agencies while acting within the scope of their employment. *Id.* at 27a-28a, 29a-30a.

The United States moved to dismiss the claim under Federal Rules of Civil Procedure 12(b)(1) (lack of subject matter jurisdiction) and 12(b)(6) (failure to state a claim on which relief can be granted) based on the FTCA's detention-of-goods exception, 28 U.S.C. 2680(c). Pet. App. 28a. That provision establishes an exception to the United States' liability under the FTCA for "[a]ny claim arising in respect of the assessment or collection

of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." 28 U.S.C. 2680(c). Respondents contended that Section 2680(c) applied only to officers collecting customs duties, and in any event did not apply to their claims because their claims related to the "seizure" of the computers, rather than their "detention." Pet. App. 32a.

The district court granted the United States' motion to dismiss the FTCA action. Pet. App. 27a-40a. The court held that 28 U.S.C. 2680(c) precluded respondents' claims regardless of whether the seizure and detention of their goods was related to the collection of customs duties or to other law-enforcement purposes, and that the protection afforded by the exception is not limited to actions of officials of the Customs Service or Internal Revenue Service but extends to the actions of all law enforcement officers. Pet. App. 32a-35a. The court also rejected respondents' argument that their claims concerned the "seizure" of the computers, rather than their "detention." *Id.* at 35a-38a. The court determined, to the contrary, that respondents' claims for "negligent destruction of property, conversion, negligent bailment, larceny, misfeasance, and personal injury" all "arise 'out of the detention' of their property, and are thus precluded by § 2680(c)." *Id.* at 38a-40a. The district court entered a final judgment dismissing respondents' claims on March 24, 2003. J.A. 36. Respondents did not appeal. Pet. App. 6a.

4. Seven months after filing their FTCA suit, respondents filed a second suit—the case presently before the Court. The initial complaint in the present suit asserted that petitioners, federal officers who allegedly participated in the search and seizure of respondents' computers, were liable under the common law of torts and under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for negligently depriving respondents of their intellectual property and business income in violation of respondents' rights under the Due Process Clause of the Fifth Amendment. See J.A. 24-26.

Petitioners moved to dismiss the suit based on the existence of the prior FTCA judgment, 28 U.S.C. 2676, the exclusiveness of the FTCA remedy for the common-law torts, 28 U.S.C. 2679(b)(1), failure of respondents' negligence allegations to state a claim for a constitutional violation, and qualified immunity. While the motion to dismiss was pending, respondents amended their complaint to delete the common-law negligence claims and to allege that petitioners had acted intentionally in damaging respondents' computers. See J.A. 34.

Petitioners then moved for judgment on the amended pleadings, contending that respondents' suit was precluded by the FTCA's judgment bar, 28 U.S.C. 2676, and that respondents failed to allege facts supporting the allegation of intentional misconduct. The district court denied petitioners' motion. Pet. App. 18a-26a. The court first considered whether its prior judgment in the FTCA action was issued under Rule 12(b)(1) or Rule 12(b)(6). *Id.* at 21a. The court believed that distinction to be significant because, according to the court, filing an FTCA claim that is subject to dismissal for lack of jurisdiction based on one of the exemptions in Section 2680 is a mere "procedural error" that has nothing to do with the "merits of [the] claims," and a subsequent suit against federal employees arising out of the same subject matter should not be barred by the FTCA's judgment bar. *Id.* at 21a-22a & n.2.

The district court acknowledged that 28 U.S.C. 2676 places no qualification on the term "judgment," Pet. App. 23a (noting "the absence of qualifying language in the statute"), and that the statute "was intended to prevent dual recovery from both the government and its employees, and the waste of government resources in defending repetitive suits," *id.* at 20a. But the court nevertheless construed Section 2676 not to apply where the prior FTCA judgment was based on one of the FTCA's exceptions to the waiver of sovereign immunity. *Id.* at 23a. Characterizing such a judgment as merely a "procedural loss" for the FTCA plaintiffs, *id.* at 24a, the district court held that "allowing plaintiffs to proceed [would] not offend the purposes of § 2676," *id.* at 26a.

The court also denied petitioners' claim to qualified immunity, concluding that respondents' allegation of intentional misconduct was sufficient to survive a motion to dismiss. Pet. App. 25a.

5. After the district court denied their motion for judgment on the pleadings, petitioners moved the district court to certify the judgment-bar issue under Section 2676 for appeal under 28 U.S.C. 1292(b). The district court denied that motion on the ground that there was not a "substantial ground for difference of opinion" on the question presented. J.A. 38 (quoting 28 U.S.C. 1292(b)). The court also noted, however, that denying the motion "would not, of course, bar an appeal as of right under the collateral order doctrine, if it is applicable." *Ibid.*

6. a. Petitioners appealed, relying on the collateral order doctrine and the All Writs Act, 28 U.S.C. 1651, to establish jurisdiction. Pet. App. 9a-10a. The court of appeals held that an order denying a motion to dismiss on the basis of the FTCA's judgment bar is immediately

appealable pursuant to the collateral order doctrine recognized in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), because it "constitutes a conclusive determination of the disputed issue," is "completely separate and distinct from the merits of the action," and "will not be *effectively* reviewable on appeal from a final judgment." Pet. App. 10a. Although the court of appeals recognized that the Third Circuit had held that such orders are not immediately appealable, *id.* at 11a (citing *Brown* v. *United States*, 851 F.2d 615, 619 (3d Cir. 1988)), it reasoned that the judgment bar is intended to "confer[] statutory immunity from suit," rather than simply a defense to liability, and that immediate appeal is therefore proper by analogy to decisions permitting immediate appeal of a denial of qualified immunity in a *Bivens* suit. See Pet. App. 10a-11a (citing *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985)). The court of appeals noted that its ruling on appellate jurisdiction was consistent with the Tenth Circuit's decision in *Farmer* v. *Perrill*, 275 F.3d 958, 961 (2001) (holding denial of motion to dismiss on judgment-bar grounds immediately appealable).

On the merits, the court of appeals affirmed the district court's conclusion that Section 2676 does not bar respondents' *Bivens* claim. Pet. App. 1a-15a. The court of appeals rejected the district court's distinction between procedural and merits-based FTCA judgments. *Id.* at 14a. The court nevertheless held that "an action brought under the FTCA and dismissed for lack of subject matter jurisdiction because it falls within an exception to the restricted waiver of sovereign immunity provided by the FTCA does not result in a 'judgment in an action under section 1346(b)'" that triggers the judgment bar. *Ibid.* (quoting 28 U.S.C. 2676). The court

reasoned that there was no "judgment" in respondents' prior case for purposes of the judgment bar in 28 U.S.C. 2676 because "the action was not *properly* brought *under* the Federal Tort Claims Act in the first place and is a nullity." *Ibid.* According to the court,

> for the judgment bar to apply, the action must first be a proper one for consideration under the Federal Tort Claims Act. In other words, it must fit within the category of cases for which sovereign immunity has been waived. If it does not, then a judgment declaring a lack of subject matter jurisdiction denotes that sovereign immunity has not been waived and that the case is not justiciable in any event.

Ibid.

b. District Judge Marrero, sitting by designation, concurred separately. Pet. App. 15a-17a. He would have adopted the district court's distinction between dismissals on the merits and dismissals on procedural grounds, rather than the majority's analysis focusing on whether the basis for the prior judgment was a lack of subject matter jurisdiction. *Id.* at 15a. Judge Marrero recognized, however, that both the approach of the district court and that of the court of appeals majority "read an implied term" into the judgment bar. *Id.* at 16a.

SUMMARY OF ARGUMENT

I. The judgment bar in Section 2676 confers on federal employees an immunity from suit where those acts have already been the basis for an FTCA action against the United States that has gone to judgment. The district court's rejection of that immunity was immediately appealable under the collateral order doctrine articulated by the Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). An appealable collateral order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (brackets in original) (quotation marks omitted).

Each of these three criteria is satisfied here. The district court order conclusively determined that petitioners were not entitled to the judgment bar. That issue is separate from the merits of respondents' *Bivens* claim, because whether it applies turns on whether respondents' prior FTCA claim on the same subject matter is the subject of a final judgment, and has nothing to do with the merits of the *Bivens* claim itself. Finally, a federal employee's statutory rights under the judgment bar can be vindicated *effectively* only by immediate appeal from an order denying those rights.

Both the text and purpose of the judgment bar demonstrate that it protects government employees not only from adverse money judgments, but also from the burdens and distractions of discovery and trial. By its terms, Section 2676 establishes a "*complete* bar" to "*any* action" once there is an FTCA judgment arising out of the same subject matter. 28 U.S.C. 2676 (emphasis added). It is, in other words, a statutory immunity from the litigation itself. This Court has upheld the immediate appealability of other claims of immunity relating to a government employee's official acts, including qualified immunity and Speech or Debate Clause immunity, and petitioners' claim of statutory immunity is similarly worthy of immediate vindication.

II. Section 2676 provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. It is undisputed that respondents brought a prior action concerning "the same subject matter" as this suit against the federal-employee petitioners, that the prior suit was brought "under section 1346(b)," and that there was a final "judgment" in the prior suit. *Ibid.* Thus, as respondents have acknowledged (Br. in Opp. 6), under the "literal, unconditional text" of Section 2676, each of the three statutory elements for application of the bar is met.

Nonetheless, the court of appeals found the judgment bar inapplicable by reasoning that because the prior action was dismissed under one of the exceptions to the FTCA provided in 28 U.S.C. 2680, it "was not *properly* brought *under* the Federal Tort Claims Act in the first place and is a nullity" for purposes of Section 2676. Pet. App. 14a. Besides being inconsistent with the text and purpose of Section 2676 itself, that holding cannot be reconciled with this Court's interpretation of other parallel provisions in the FTCA or with the nature of the Section 2680 exceptions as reflected in the overall structure of the Act.

In addition to Section 2676, the FTCA has other provisions that limit a plaintiff's ability to sue defendants other than the United States for injuries resulting from a federal employee's actions. In *United States* v. *Smith*, 499 U.S. 160, 166 (1991), this Court held that one of those exclusivity provisions, 28 U.S.C. 2679(b)(1), barred a tort suit against an individual employee even if, as a result of one of Section 2680's exceptions, "the FTCA

itself does not provide a means of recovery." 499 U.S. at 166. The Court recognized that Section 2679(b)(1) applies even though the plaintiff's alternative remedy is an "action * * * pursuant to section 1346(b)," 28 U.S.C. 2679(d)(4), in which one of the Section 2680 exceptions may ultimately preclude relief. 499 U.S. at 166.

The FTCA's other exclusivity provision, 28 U.S.C. 2679(a), provides that, despite any federal agency's sue-and-be-sued clause, the FTCA remedies are exclusive for all "claims which are cognizable under section 1346(b)." In *FDIC* v. *Meyer*, 510 U.S. 471 (1994), the Court held this provision encompasses all claims that are "actionable under § 1346(b)," in the sense that they allege the basic elements of jurisdiction set forth in Section 1346(b). *Id.* at 477. As numerous courts of appeals have recognized, applying *Meyer*, a claim against a federal agency that alleges the basic requirements of Section 1346(b) is "actionable under § 1346(b)," and must be pursued against the United States under the FTCA, even if one of the exceptions in Section 2680 is likely to prevent recovery.

The Second Circuit offered no explanation why the phrase "action under section 1346(b)" in Section 2676 excludes suits that allege the basic elements of Section 1346(b) but are ultimately dismissed on the basis of Section 2680, when the parallel provisions of Section 2679(b)(1) and Section 2679(a) *would* include such actions.

The court of appeals' mistaken construction of Section 2676 derives from a fundamental misconception of the FTCA that presumes a clear dichotomy between jurisdictional and non-jurisdictional judgments. That distinction does not withstand scrutiny in the context of the FTCA, in which judgments that would plainly be "on

the merits" in any other context can properly be termed dismissals for lack of subject matter jurisdiction. The Section 2680 exceptions, in particular, confound any simple categorization. The FTCA's jurisdictional provision, Section 1346(b), incorporates the other FTCA provisions, 28 U.S.C. 2671-2680, by reference, and, for that reason, a dismissal on the basis of one of the Section 2680 exceptions can properly be termed a dismissal for lack of subject matter jurisdiction. But that fact does not deprive the exceptions of their *substantive* character as limitations on the scope of the liability to which the United States has subjected itself under the FTCA. The language of Section 2680, which states that the exceptions apply *both* to Section 1346(b) *and* the other provisions of chapter 171, including 28 U.S.C. 2674, which defines the United States' substantive liability, makes clear the dual jurisdictional and substantive nature of the exceptions. Likewise, the inquiry entailed in applying the exceptions, which can involve issues similar to those that arise in other, plainly non-jurisdictional, contexts, and can consume considerable resources through extensive discovery and even trial, evidences their substantive character. Thus, the central premise of the Second Circuit's decision—a clear distinction between dismissals for lack of subject matter jurisdiction and judgments on non-jurisdictional grounds—is mistaken.

ARGUMENT

The FTCA grew out of "a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." *Dalehite* v. *United States*, 346 U.S. 15, 24-25 (1953), partially overruled on other grounds by *Rayonier Inc.* v. *United States*, 352 U.S. 315 (1957). Before the FTCA's

enactment, parties injured by a government employee's actions were forced to seek relief through private bills in Congress, *ibid.*, or by suing the government employee in his individual capacity, *United States* v. *Gilman*, 347 U.S. 507, 511 n.2 (1954) (quoting testimony of Assistant Attorney General Francis M. Shea). Such suits constituted "a very real attack upon the morale of the services" because most government employees were "not in a position to stand or defend large damage suits." *Ibid.* They also represented a burden on government resources, because "the Government, through the Department of Justice, [was] constantly being called on * * * to go in and defend" federal employees from suit. *Ibid.*

In the FTCA, Congress "waived sovereign immunity from suit for certain specified torts of federal employees." *Dalehite*, 346 U.S. at 17. The FTCA, however, places a variety of limits on the United States' waiver of its immunity as well as on the scope of the United States' substantive liability under the Act, and does "not assure injured persons damages for all injuries caused by such employees." *Ibid.* Among the FTCA's limits is the judgment bar, 28 U.S.C. 2676. Section 2676 provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." *Ibid.* Once the FTCA action is the subject of a judgment, that judgment cuts off the claimant's ability to pursue other avenues of relief against government employees. By enacting the FTCA, Congress offered plaintiffs the opportunity to sue a financially responsible defendant, subject to the limits and exceptions Congress placed on the government's liability. By making the judgment bar an inte-

gral part of the FTCA, Congress ensured that, if a claimant chose to pursue an FTCA action against the United States, the judgment in that suit would protect federal employees against the threat and distraction of litigation and protect the government itself from having to expend its resources defending multiple actions arising out of the same incident.

I. THE DISTRICT COURT'S DENIAL OF PETITIONERS' STATUTORY RIGHT TO BE FREE FROM SUIT ON RESPONDENTS' CLAIMS WAS IMMEDIATELY APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE

A. This Court Has Recognized The Immediate Appealability Of District Court Orders That Finally Resolve Important Claims Of Right And Would Otherwise Be Effectively Unreviewable, Such As A Government Official's Claim To Immunity From Suit For His Official Acts

"Section 1291 of Title 28, U.S.C., gives courts of appeals jurisdiction over 'all final decisions' of district courts" not immediately appealable to this Court. *Behrens* v. *Pelletier*, 516 U.S. 299, 305 (1996). The Court has given Section 1291's requirement of a "final decision[]" a "practical rather than a technical construction." *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); see *Abney* v. *United States*, 431 U.S. 651, 658 (1977) (noting that Section 1291 specifies "final decisions" rather than "final judgments"). Thus, "the statute entitles a party to appeal not only from a district court decision that 'ends the litigation on the merits and leaves nothing [more] for the court to do but execute the judgment,'" *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (quoting, with modification, *Catlin* v. *United States*, 324 U.S. 229, 233 (1945)),

but also from a "small class" of district court decisions that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated," *Cohen*, 337 U.S. at 546.

Under the "collateral order doctrine" articulated in *Cohen*, the Court applies a three-pronged test to determine whether an order falls within the category of appealable decisions. An appealable collateral order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (brackets in original) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)).

Many of the classes of orders that the Court has held are subject to immediate appeal under the collateral order doctrine involve a defendant's "entitlement not to stand trial or face the other burdens of litigation." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). In *Mitchell*, the Court upheld a government official's right to take an immediate appeal from a decision denying him qualified immunity, because the benefits of the immunity would be "effectively lost if a case [were] erroneously permitted to go to trial," *ibid.* In *Abney* v. *United States*, *supra*, the Court likewise held that the denial of a double jeopardy challenge to a criminal prosecution is an appealable collateral order. The Court reasoned that the Fifth Amendment's Double Jeopardy Clause protects against "repeated attempts to convict an individual

[defendant] for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." 431 U.S. at 661-662 (quoting *Green* v. *United States*, 355 U.S. 184, 187 (1957)). Only immediate appeal could give "full protection" to that constitutional right "not to face trial at all." 431 U.S. at 662 & n.7.

The Court has also allowed immediate appeal of orders concerning other rights not to stand trial "originating in the Constitution or statutes." *Digital Equip.*, 511 U.S. at 879. Thus, in *Digital Equipment*, the Court distinguished rights "embodied in a constitutional or statutory provision," or those (such as qualified immunity) with a similarly "good pedigree in public law," which are entitled to immediate review, from defenses to suit based solely on a private settlement agreement, which are not. *Id.* at 875, 879. The Court, for example, has allowed immediate appeal of a claim of Eleventh Amendment immunity, *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 147, a former President's claim of absolute immunity respecting his official acts, *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742 (1982), and a Member of Congress's claim that the Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1, shields him from suit, *Helstoski* v. *Meanor*, 442 U.S. 500, 508 (1979). In each case, the Court recognized that the interest protected by the right would "for the most part [be] lost as litigation proceeds past motion practice." *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 145. See *Nixon*, 457 U.S. at 752 n.32 (observing that "[a]mong the most persuasive reasons supporting official immunity" is the fact that "to submit [government] officials * * * to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute" (quoting

Gregoire v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.)); *Helstoski*, 442 U.S. at 508 ("the Speech or Debate Clause was designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves'") (quoting *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967)).

B. Congress's Specification In Section 2676 That A Prior Federal Tort Claims Act Judgment Is A "Complete Bar To Any Action" Against The Individual Government Employee Creates A Right To Be Free From Suit That Triggers A Right Of Immediate Appeal

The FTCA's judgment bar, 28 U.S.C. 2676, provides that the judgment in an FTCA action "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." The court of appeals correctly held that the district court's order denying petitioners' motion to dismiss on the basis of the judgment bar was immediately appealable. The judgment bar reflects Congress's concern that federal employees should not be subjected to the burden and distraction of litigation based upon their official acts when the plaintiff has already pursued to judgment a claim based on the same subject matter against the United States itself. Section 2676 thus confers immunity from suit, not merely from liability. The district court order denying petitioners the benefit of their statutory right to be "complete[ly]" free from "any action" related to respondents' claims, which are the subject of a prior FTCA judgment, satisfies all three prongs of the collateral order doctrine and warrants immediate review.

1. It is beyond serious dispute that the district court's order denying petitioners' motion meets the first two criteria for a collateral order: (a) the district court's decision "constitute[s] a complete, formal, and, in the trial court, final rejection" of petitioners' judgment bar claim, *Abney*, 431 U.S. at 659; and (b) the issue presented by petitioners' appeal is "collateral to" and "separable from" the underlying merits of respondents' suit, *ibid.*

a. The district court held conclusively that "the judgment bar statute does not bar plaintiff's *Bivens* suit." Pet. App. 26a. After the district court refused to certify the judgment bar issue for appeal under 28 U.S.C. 1292(b), there were "simply no further steps that [could] be taken in the District Court," *Abney*, 431 U.S. at 659, to "avoid the burdens of 'such *pretrial* matters as discovery,'" *Behrens*, 516 U.S. at 308 (quoting, *Mitchell*, 472 U.S. at 526 (emphasis added)).[1]

b. Further, as in *Mitchell* and *Abney*, petitioners' appeal does not require consideration of the underlying merits of respondents' claims. "An appellate court reviewing the denial of the defendant's [judgment bar] claim * * * need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a

[1] The fact that the district court declined to certify the issue for immediate appeal under the discretionary standard of 28 U.S.C. 1292(b) is irrelevant to petitioners' submission that the order is appealable as of right under 28 U.S.C. 1291, as the district court itself recognized. See *Digital Equipment*, 511 U.S. at 883-884 n.9 ("[W]e find nothing in the text or purposes of either" 28 U.S.C. 1291 or 28 U.S.C. 1292(b) to suggest "that a party's request to appeal under § 1292(b) might operate, practically or legally, to prejudice its claimed right to immediate appeal under § 1291.").

claim." *Mitchell*, 472 U.S. at 527-528. The validity of petitioners' claim to immunity under the judgment bar would not be affected by anything that might occur during the remaining trial proceedings. Whether the judgment bar applies turns not on what facts may ultimately be proven, but on whether there was a prior judgment in the FTCA action and whether respondents' present claim against the federal-employee petitioners arises out of the "same subject matter." 28 U.S.C. 2676. While resolution of petitioners' judgment bar claim may "entail consideration of the factual allegations that make up the plaintiff's claim for relief," *Mitchell*, 472 U.S. at 528, the same is true of questions of qualified immunity, Speech or Debate Clause immunity, and the Fifth Amendment prohibition against double jeopardy, *ibid.* Just as resolution of a double jeopardy claim will require a court of appeals to "compare the facts alleged in the second [action] with those in the first" to determine "whether the prosecutions are for the same offense," *ibid.*, in the case of the judgment bar, the court must compare the facts alleged in the two cases to determine whether the second action is "by reason of the same subject matter" as the first, 28 U.S.C. 2676. In either case, the defendant's motion "makes no challenge whatsoever to the merits of the charge against him," *Abney*, 431 U.S. at 659, and is by its "very nature * * * collateral to, and separable from, the principal issue" in the underlying suit, *ibid.*

2. The court of appeals also correctly held, Pet. App. 10a-11a, that the third prong of the collateral order doctrine is satisfied because the district court's order denying petitioners' rights under the judgment bar would "be effectively unreviewable on appeal from a final judgment," *Coopers & Lybrand*, 437 U.S. at 468. As the court of appeals recognized, "Section 2676 * * * con-

fers statutory immunity from suit," which, like qualified immunity, "provides an 'entitlement not to stand trial or face the other burdens of litigation,'" Pet. App. 10a-11a (quoting *Mitchell*, 472 U.S. at 526). Accord *Farmer* v. *Perrill*, 275 F.3d at 961 (Section 2676 "confers immunity from further suit rather than just from liability"). Both the text and purposes of Section 2676 support that conclusion.[2]

By its terms, Section 2676 provides that a prior FTCA judgment is a "complete bar to any action" against a government employee arising out of the same subject matter. 28 U.S.C. 2676. Those terms make plain that the bar does not simply prevent an award of damages against the employee. Rather, it bars the "action" itself and does so "complete[ly]." Only appeal before the employee is subjected to the burdens of discovery and

[2] The only contrary appellate decision is *Brown* v. *United States*, 851 F.2d 615, 618-619 (3d Cir. 1988). In *Brown*, the Third Circuit simply stated, in a single sentence and without elaboration, that the denial of a judgment bar motion "may be reviewed upon appeal from final judgment." *Id.* at 619. The relevant question under the collateral order doctrine, of course, is whether the issue may be *effectively* reviewed on appeal from a final judgment, see, *e.g.*, *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 144, as the Third Circuit in *Brown* itself recognized in holding that the denial of qualified immunity in that case *was* immediately appealable. See 851 F.2d at 619 ("The Supreme Court has held that an order denying a claim of qualified immunity is not *effectively* reviewable after the case is adjudicated and hence is appealable before final judgment under the collateral order doctrine.") (emphasis added). For the reasons stated in the text, a denial of the protection of the judgment bar is no more effectively reviewable on appeal from a final judgment than denials of qualified immunity, Speech or Debate Clause immunity, or Double Jeopardy claims. The Third Circuit, moreover, made no attempt to reconcile its holding with the text and purposes of Section 2676 or with this Court's decisions allowing the immediate appeal of similar orders.

trial can give effect to the statute's promise of a "complete" shield from "any action." See Pet. App. 10a (the judgment bar "confers statutory immunity from suit"); *Farmer*, 275 F.3d at 961.

The legislative purpose behind the judgment bar further demonstrates that it was intended to furnish a "complete" immunity from suit. Congress enacted the FTCA in part to address the concern that "the Government, through the Department of Justice, [was] constantly being called on by the heads of the various agencies to go in and defend" federal employees from suit. *Gilman*, 347 U.S. at 511 n.2 (quoting testimony of Assistant Attorney General Francis M. Shea).[3] Such suits constituted "a very real attack upon the morale of the services" because most government employees were "not in a position to stand or defend large damage

[3] Much of the relevant history of the FTCA "appears in the Seventy-seventh Congress, rather than in the Seventy-ninth Congress, which enacted it." *Gilman*, 347 U.S. at 511 n.2 (citing *Dalehite*, 346 U.S. at 24-30). As the opinion in *Gilman* notes, 347 U.S. at 511 n.2, Assistant Attorney General Shea's remarks were made in specific reference to the provision that became Section 2672 of the FTCA, which provides that an FTCA plaintiff's acceptance of an "award, compromise, or settlement" offered by the Attorney General "shall constitute a complete release of any claim * * * against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter." 28 U.S.C. 2672. The Court recognized, however, the similarities between Section 2672 and Section 2676, *Gilman*, 347 U.S. at 511-512 n.2, as did Assistant Attorney General Shea in his own comments, see *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 27 (1942) ("Judgment in a tort action constitutes a bar to further action upon the same claim, not only against the Government (as would have been true under H.R. 5573), but also against the delinquent employee, *for reasons already discussed in respect of administrative adjustments* of claims up to $1,000.") (emphasis added).

suits." *Ibid.* The FTCA addresses that problem by allowing plaintiffs to sue the United States instead of the individual employee. The judgment bar, which prevents the plaintiff from "turn[ing] around and su[ing]" the individual employee once the FTCA action has gone to judgment, is an essential feature of that statutory scheme. *Ibid.*

As the legislative history reflects, the judgment bar serves the same important purposes as the doctrine of qualified immunity and other forms of government-employee immunity. Like those other immunities, the judgment bar recognizes that there are significant "costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell*, 472 U.S. at 526 (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982)). See *Gilman*, 347 U.S. at 511 n.2 (testimony of Assistant Attorney General Shea); *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994) (Section 2676 reflects Congress's "concern[] about the government's ability to marshal the manpower and finances to defend subsequent suits against its employees"), cert. denied, 515 U.S. 1144 (1995). Because Section 2676 is designed to protect against the "very substantial burden * * * in conducting the defense," as well as the impact of tort litigation "upon the morale" of government employees, *Gilman*, 347 U.S. at 511 n.2 (quoting testimony of Assistant Attorney General Shea), the cost of delaying appellate review of a judgment bar claim is significant. See *Mitchell*, 472 U.S. at 526-527 (same with respect to qualified immunity). Indeed, it would be strange if the appeal rights of government employees were more robust in the context of judicially-created immunities than in

the context of the "complete bar" expressly provided by Congress. As the Court has previously recognized, where Congress has itself established the right to be free from suit, "there is little room for the judiciary to gainsay its 'importance.'" *Digital Equip.*, 511 U.S. at 879.

At the same time, immediate appeal of the district court's order carries little cost in terms of piecemeal review. See *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152-153 (1964) (observing that *Cohen*'s "finality" standard assesses whether "the danger of denying justice by delay" outweighs "the inconvenience and costs of piecemeal review") (quoting *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)). The correctness of the district court's ruling would not be affected by anything that might occur during the remaining trial proceedings. Rather, the appellate court is asked to determine a pure "question of law" that is entirely distinct from either "the merits of the plaintiff's claim" or "the correctness of the plaintiff's version of the facts." *Mitchell*, 472 U.S. at 527-528. Thus, deferring appellate review until after final judgment would not assist the court of appeals in deciding those questions.

For the same reasons, the courts of appeals have uniformly upheld a federal employee's right immediately to appeal a district court's refusal to dismiss claims against him under another provision of the FTCA that provides for substitution of the United States as defendant. In the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563, Congress provided that, with certain specified exceptions, the remedy provided by the FTCA "preclude[s]" "[a]ny other civil action

* * * relating to the same subject matter against the employee" for acts within the scope of his employment, and that the United States should be substituted as the defendant. 28 U.S.C. 2679(b)(1), (2) and (d)(1)-(4). Each court of appeals to consider the issue has held that a district court order rejecting the substitution of the United States as defendant is immediately appealable because such an order has the effect of denying the employee the immunity from suit that the Westfall Act guarantees. See *Taboas* v. *Mlynczak*, 149 F.3d 576, 579 (7th Cir. 1998) ("the denial of the United States' motion for substitution in this context is effectively a denial of immunity for the defendant employee," and "the collateral order doctrine therefore applies with as much force in this context as it does to other claims of qualified or absolute immunity"). See also *Rodriquez* v. *Sarabyn*, 129 F.3d 760, 764 (5th Cir. 1997); *Coleman* v. *United States*, 91 F.3d 820, 823 (6th Cir. 1996); *Flohr* v. *Mackovjak*, 84 F.3d 386, 390 (11th Cir. 1996); *Kimbro* v. *Velten*, 30 F.3d 1501, 1503 (D.C. Cir. 1994), cert. denied, 515 U.S. 1145 (1995); *Jamison* v. *Wiley*, 14 F.3d 222, 230 n.10 (4th Cir. 1994); *Melo* v. *Hafer*, 13 F.3d 736, 741 (3d Cir. 1994); *Pelletier* v. *Federal Home Loan Bank*, 968 F.2d 865, 873 (9th Cir. 1992); *McHugh* v. *University of Vt.*, 966 F.2d 67, 69 (2d Cir. 1992).

Like Westfall Act immunity, qualified immunity, and other rights of government employees to be free from suit respecting their official conduct, the statutory immunity provided by the FTCA's judgment bar can be reviewed effectively only on immediate appeal from an order denying its protection. The court of appeals correctly concluded that it had jurisdiction pursuant to 28 U.S.C. 1291 to consider petitioners' appeal.

II. THE JUDGMENT BAR APPLIES TO A PRIOR FTCA JUDGMENT BASED ON ONE OF THE ACT'S EXCEPTIONS IN SECTION 2680

A. Under The Plain Language Of The Judgment Bar, The Prior Judgment In Respondents' FTCA Suit Bars Their Present Action Against The Individual Government Employees Whose Conduct Was There At Issue

The text of the FTCA's judgment bar is simple and direct, and there is no question that the express elements for its application are satisfied in this case. The statute provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. It is clear that each of the specified elements of the judgment bar is met here.

1. There is no question that the district court entered a "judgment" in respondents' FTCA litigation. On March 21, 2003, the district court issued a Memorandum-Decision and Order in which the court granted the United States' motion to dismiss all of respondents' FTCA claims. The court ruled that "[a]ll of plaintiffs' claims arise out of the detention of their property by agents of the United States, and are therefore barred" by 28 U.S.C. 2680(c). Pet. App. 40a. On that basis, the court "ORDERED that the First Restated and Amended Complaint for Damages is DISMISSED." *Ibid.* On March 24, 2003, the Clerk of Court issued a "Judgment in a Civil Case," stating that "IT IS ORDERED AND ADJUDGED that the First Restated and Amended Complaint for Damages is DISMISSED pursuant to the Order of Judge David N. Hurd dated

3/21/03," J.A. 36. Those actions plainly qualify as the entry of "judgment" in the FTCA action. The district court's order resolved "all the claims and the rights and liabilities of all the parties," see Fed. R. Civ. P. 54(b), and the "judgment" was "set forth on a separate document," pursuant to Federal Rule of Civil Procedure 58. Thus, the judgment entered on March 24, 2003, was an "order from which an appeal lies," and qualified as a "judgment," as that term is defined in the Federal Rules. See Fed. R. Civ. P. 54(a).[4] Indeed, the court of appeals acknowledged that "[a] judgment of dismissal" was entered in respondents' FTCA action, and that "[n]o appeal was taken from that judgment." Pet. App. 6a.

The court of appeals also recognized (Pet. App. 14a-15a) that a judgment under the FTCA triggers the judgment bar in a subsequent suit against a federal employee on the same subject matter even when, as here, the FTCA judgment is adverse to the claimant. The other courts of appeals that have considered the question have unanimously agreed. See *Farmer*, 275 F.3d at 963; *Hoosier Bancorp of Indiana, Inc.* v. *Rasmussen*, 90 F.3d 180, 184 (7th Cir. 1996); *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995). Section 2676 prescribes a "judgment" bar, not a "favorable judgment" bar. As the Tenth Circuit has explained, "Section 2676 makes no distinction between favorable and unfavorable judgments—it simply refers to '[t]he judgment in an action under section 1346(b).'" *Farmer*, 275 F.3d at 963. The first element—the requirement of a "judgment" in the FTCA action—is therefore satisfied.

[4] We note that the prior FTCA judgment here at issue did resolve all claims as to all parties and that the judgment was entered on a separate paper solely to emphasize that the existence of a judgment in this case is beyond dispute. The petition does not present the question whether either of those qualities is a prerequisite to a "judgment" within the meaning of the judgment bar. Notably, when the judgment bar was enacted, there was no separate paper requirement for a judgment. See Charles Alan Wright et al., *Federal Practice and Procedure* § 2785 (1995). Also, some courts have had to determine the judgment bar's effect where FTCA and *Bivens* claims are litigated in the same suit. Several courts have held in such circumstances that where a plaintiff has obtained a judgment against the United States under the FTCA the judgment bar prevents the plaintiff from also enforcing a jury verdict against the individual government employee. See, *e.g.*, *Arevalo* v. *Woods*, 811 F.2d 487, 490 (9th Cir. 1987); *Serra* v. *Pichardo*, 786 F.2d 237, 241-242 (6th Cir.), cert. denied, 479 U.S. 826 (1986). Neither of those issues is before the Court here.

2. Respondents' prior FTCA suit was also clearly "an action under section 1346(b)." 28 U.S.C. 2676. The sole basis asserted for the district court's jurisdiction in respondents' suit against the United States was the FTCA. The first paragraph of respondents' First Restated and Amended Complaint for Damages, 02-CV-942 (N.D.N.Y.) (which has been lodged with the Court), stated: "This action is brought pursuant to the Federal Tort[] Claim[s] Act, 28 U.S.C. § 1346 and 28 U.S.C. § 2671-2680, and jurisdiction is properly within this Court." The district court order dismissing that complaint likewise recognized that it had been "brought * * * against defendant United States of America ('United States') pursuant to the Federal Tort Claims Act ('FTCA'), 28 U.S.C. § 1346." Pet. App. 27a. And the court of appeals specifically acknowledged that respondents' alleged injury "was the subject of a previous action brought by plaintiffs against the United States of America under the Federal Tort Claims Act ('FTCA'), 28 U.S.C. § 1346." Pet. App. 5a.

3. Finally, it is plain that the *Bivens* claim asserted in this case arises "by reason of the same subject mat-

ter" as respondents' prior FTCA action. 28 U.S.C. 2676.[5] The breadth of that phrase makes clear that Congress "desired to do more than merely bar a plaintiff from bringing a subsequent identical action on the same claim." *Serra* v. *Pichardo*, 786 F.2d 237, 239 (6th Cir.), cert. denied, 479 U.S. 826 (1986). Rather, so long as "the substance of the *Bivens* claims reveals that they arise from the same actions toward plaintiff by defendants as those that defined the FTCA case," the "same subject matter" test is satisfied. *Id.* at 241; *Arevalo* v. *Woods*, 811 F.2d 487, 490 (9th Cir. 1987) (quoting same).

A comparison of the complaints at issue here leaves no question that the two actions arise out of "the same subject matter." Respondents' *Bivens* complaint repeats, verbatim, the allegations of respondents' FTCA complaint that "[o]n June 8, 2000, at approximately 9:00 A.M., * * * [at] premises located at 194 Ferncliff Road," federal agents "seized all computer equipment, computer software, computer data, and computer hard disk drives," and that, when the computers and hard drives were returned six months later, several "had been damaged to the extent of being totally unusable," and five disk drives were "damaged to the point of complete loss of all stored data," resulting in "special damages in the amount of $4,421,700." See FTCA Compl. 3, 5, 11; J.A. 30-31, 33, 34 (First Amended *Bivens* Compl.). These identical allegations and demands for relief satisfy any reasonable construction of Section 2676's "same subject matter" requirement.

[5] As we point out in our reply brief at the petition stage (at 6), all six courts of appeals to have considered the question, including the Second Circuit in this case, have correctly held that the judgment bar in Section 2676 applies to *Bivens* actions in the same manner that it applies to other suits against federal employees that arise out of the same subject matter as the FTCA action. See Pet. App. 12a-14a; *Farmer*, 275 F.3d at 963; *Hoosier Bancorp*, 90 F.3d at 184-185; *Gasho*, 39 F.3d at 1437-1438; *Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989); *Serra*, 786 F.2d at 241. That conclusion is compelled by the unqualified statutory text, which bars "*any* action by the claimant" against the employees arising out of the same subject matter. 28 U.S.C. 2676 (emphasis added).

The only difference between respondents' complaints is the level of culpability attributed to the federal agents. In their FTCA complaint, respondents alleged that the damage was caused by the government officials' "misuse, negligent and improper handling, * * * and perhaps intent," FTCA Compl. 6, whereas in their amended *Bivens* complaint, respondents have dropped the negligence allegation and maintain only that petitioners "intentionally caused" the damage, J.A. 33.[6] A plaintiff cannot, however, defeat the judgment bar simply by revising the level of scienter with which the federal employees are alleged to have acted. It is the conduct of the employees that allegedly caused the injury in the two cases—not the employees' alleged state of mind —that determines whether the subsequent suit against the individual employees arises out of the "same subject matter" as the prior FTCA action. See *Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989) ("same subject matter" refers to the "factual provenance and not the character of the claim"); *Serra*, 786 F.2d at 241 (noting that "[t]he only difference between the claims is that the

[6] Respondents' original complaint in this action retained the allegation that petitioners acted negligently, and it asserted common-law negligence causes of action as well as a *Bivens* claim. J.A. 24-26. Those allegations were dropped when, after petitioners moved to dismiss, respondents filed their First Amended Complaint asserting only a cause of action under *Bivens*. J.A. 34.

Bivens claims involve an examination of the intent of the defendants").

4. In their brief in opposition in this Court, respondents conceded that their *Bivens* suit would be barred under the "literal, unconditional text" of Section 2676. Br. in Opp. 6. Respondents urged, however, that the action should be permitted to proceed "despite" the statute's language based on unwritten limitations that respondents urged the Court to read into the provision. *Ibid.* Similarly, the court of appeals recognized that respondents' alleged injury "was the subject of a previous action brought by plaintiffs against the United States of America under the Federal Tort Claims Act ('FTCA'), 28 U.S.C. § 1346," Pet. App. 5a, but refused to enforce the judgment bar on the theory that although the prior suit was brought under the FTCA, it "was not *properly* brought *under* the Federal Tort Claims Act in the first place and is a nullity." *Id.* at 14a.

There was no justification for the court of appeals to engraft additional qualifications onto the statute. "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quotation marks omitted). See *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004) (quoting same); *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (analysis of a statute "begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well") (citation and internal quotation marks omitted). There is no argument here that applying Section 2676 by its terms would be absurd. To the contrary, as we demonstrate below, it is the court of

appeals' modification of the text that renders the statute unworkable. See pp. 38-49, *infra*.

B. Application Of The Judgment Bar In This Case Is Confirmed By This Court's Construction Of Nearly Identically Worded Provisions Of The FTCA

Application of the judgment bar according to its "literal, unconditional text," Br. in Op. 6, is, moreover, consistent with the way in which this Court and the courts of appeals have construed parallel text in the FTCA's exclusivity provisions, 28 U.S.C. 2679(a) and (b). Statutory text must be construed "in its context and in light of the terms surrounding it." *Leocal* v. *Ashcroft*, 125 S. Ct. 377, 382 (2004). The Second Circuit's interpretation of Section 2676 fails that test, because it creates unwarranted incongruities between the phrase "action under Section 1346(b)" in that section and similar phrases with similar purposes in the FTCA's exclusivity provisions.

Like Section 2676, the FTCA's exclusivity provisions specify circumstances in which the FTCA precludes a plaintiff from suing a party other than the United States based upon the actions of federal employees. Like Section 2676, the exclusivity provisions define the scope of their application with reference to Section 1346(b). Both Section 2679(a) and Section 2679(b), the courts have held, encompass actions that satisfy the basic elements of Section 1346(b), even though recovery against the United States may ultimately be precluded by one of the exceptions in Section 2680. The Second Circuit's construction of the phrase "judgment in an action under section 1346(b)" in Section 2676 as including only those actions properly brought under that Section and excluding judgments based on the Section 2680 exceptions cannot be squared with the settled construction of the parallel provisions in Section 2679(a) and Section 2679(b).

1. *Section 2679(b).* Section 2679(b) of the FTCA, adopted as part of the Westfall Act, states that, with certain exceptions, "[t]he remedy against the United States provided by sections 1346(b) and 2672 of this title" is exclusive and that a claim against the employee whose conduct is at issue is precluded. 28 U.S.C. 2679(b)(1) and (2).[7] In *United States* v. *Smith*, 499 U.S. 160 (1991), this Court rejected a construction of Section 2679(b)(1)'s phrase "remedy * * * provided by sections 1346(b) and 2672" that was nearly identical to (though actually more textually plausible than) the reading of Section 2676's phrase "action under section 1346(b)" that the court of appeals adopted here.

The Ninth Circuit in *Smith* had held that Section 2679(b)'s exclusive-remedy provision could foreclose a suit against the federal employee in his individual capacity only if the FTCA would in fact provide the plaintiff a remedy once the United States was substituted as the defendant. See *Smith* v. *Marshall*, 885 F.2d 650, 654-656 (9th Cir. 1989). Because the FTCA's foreign country exception, 28 U.S.C. 2680(k), would have precluded recovery against the United States in an action under

[7] Section 2679(b)(2) creates an exception to the general rule of FTCA exclusivity for *Bivens* and certain statutory actions. See 28 U.S.C. 2679(b)(2). Section 2679(b)(2)(A)'s explicit carve-out for *Bivens* claims is an additional reason *not* to read an implied exception for *Bivens* claims into Section 2676. See *supra* n.5. The Westfall Act exception for *Bivens* claims makes clear that Congress knew how to preserve constitutional-tort liability of federal employees when it desired to do so, and that inferring other exceptions in the FTCA is not warranted. See *United States* v. *Smith*, 499 U.S. 160, 166-167 (1991) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (quoting *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980)).

Section 1346(b), the Ninth Circuit held that Section 1346(b) did not provide the plaintiff a remedy against the United States and that Section 2679(b) therefore did not prevent the suit from going forward against the employee. See *Smith*, 885 F.2d at 655.

This Court reversed, holding that Section 2679(b) bars suit against an individual employee even if, as a result of one of Section 2680's exceptions, "the FTCA itself does not provide a means of recovery." *Smith*, 499 U.S. at 166. The Court supported its construction of Section 2679(b) by referring to Section 2679(d). That section provides that, if a tort suit is brought against a federal employee who was acting within the scope of his employment, the United States is to be substituted as the defendant, see 28 U.S.C. 2679(d)(1), (2) and (3), and the suit "shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) * * * and shall be subject to the limitations and exceptions applicable to those actions." 28 U.S.C. 2679(d)(4). The Court reasoned that the "limitations and exceptions" language in Section 2679(d)(4) encompasses the "exceptions" in Section 2680, and demonstrated that "Congress recognized that the required substitution of the United States as the defendant in tort suits filed against Government employees would sometimes foreclose a tort plaintiff's recovery altogether." *Smith*, 499 U.S. at 166. In other words, the "remedy * * * provided by section[] 1346(b)," 28 U.S.C. 2679(b)(1), might well be an action under Section 1346(b) that is later dismissed based on one of the exceptions in Section 2680.

The court of appeals' construction of Section 2676 in this case cannot be reconciled with *Smith*'s construction of Sections 2679(b)(1) and (d)(4). The operative text of

the provisions is parallel, and there is no basis for the greatly divergent construction that the court of appeals would give them. Just as the phrase "[t]he remedy * * * provided by section[] 1346(b)" in Section 2679(b)(1) and the phrase "action against the United States filed pursuant to section 1346(b)" in Section 2679(d)(4) include cases in which a claim brought under Section 1346(b) would ultimately be held precluded by Section 2680, so too the phrase "an action under section 1346(b)" in the FTCA's judgment bar includes a case brought under Section 1346(b) that is later determined to be precluded by Section 2680. Indeed, if anything, Section 2679(b)'s reference to "[t]he remedy" might more plausibly be thought to exclude cases in which the FTCA does not provide a remedy than the judgment bar's reference to "[t]he judgment in an action under section 1346(b)" could be read to exclude cases brought under Section 1346(b) but subject to dismissal under Section 2680. Thus, the Second Circuit's efforts to limit the reach of the judgment bar are inconsistent with the Court's decision in *Smith*.

2. *Section 2679(a).* The Second Circuit's construction of Section 2676 also cannot be squared with this Court's construction of the FTCA's other exclusivity provision, 28 U.S.C. 2679(a). Section 2679(a) makes the FTCA the exclusive avenue for tort claims against the federal government, including against agencies that may otherwise "sue and be sued" in their own names. See *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994). Section 2679(a) provides:

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are *cognizable under section 1346(b)* of this title, and the remedies provided by this title in such cases shall be exclusive.

28 U.S.C. 2679(a) (emphasis added).

In *Meyer*, the Court held that a claim is "cognizable under section 1346(b)" if it is within the category of claims defined by Section 1346(b), which consists of:

> claims that are "[1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

510 U.S. at 477 (brackets in original) (quoting 28 U.S.C. 1346(b)). The Court explained that a claim "comes within this jurisdictional grant—and thus is 'cognizable' under § 1346(b)—if it is actionable under § 1346(b). And a claim is actionable under § 1346(b) if it alleges the six elements outlined above." *Ibid.* Indeed, the Court emphasized that "[t]he question is not whether a claim is cognizable *under the FTCA* generally, * * * but rather whether it is 'cognizable *under section 1346(b)*'" in particular. *Id.* at 477 n.5 (quoting 28 U.S.C. 2679(a)).

Applying *Meyer*, several courts of appeals have recognized that a claim is "cognizable under section 1346(b)," and thus precludes suit against the agency directly, so long as the claim asserts the six elements listed in Section 1346(b), even if the FTCA as a whole would not render the United States liable due to one or more of the exceptions in Section 2680. See *Audio Od-*

yssey, Ltd. v. *United States*, 255 F.3d 512, 522 (8th Cir. 2001); *Davric Maine Corp.* v. *USPS*, 238 F.3d 58, 61-64 (1st Cir. 2001); *Franklin Sav. Corp.* v. *United States*, 180 F.3d 1124, 1142-1143 (10th Cir.), cert. denied, 528 U.S. 964 (1999). Those decisions make clear that under Section 2679(a), an action is "cognizable under section 1346(b)" so long as it asserts a tort claim under state law, even if that claim is ultimately rejected because of the application of one of the exceptions in Section 2680.

The decision of the court of appeals in this case, by contrast, makes the very mistake the Court warned against in *Meyer*. Whereas Section 2676 refers to an "action under section 1346(b)," the court of appeals rewrote the statute as requiring an "action * * * *properly* brought *under* the Federal Tort Claims Act" generally, and thus not to apply to an action brought under Section 1346(b) where recovery is later found to be barred by one of the exceptions in Section 2680. Pet. App. 14a.

The court of appeals made no effort to harmonize its construction of the phrase "action under section 1346" for purposes of 28 U.S.C. 2676, and the established meaning of the phrase "cognizable under section 1346(b)" in 28 U.S.C. 2679(a). Nor is there any apparent basis for treating the two phrases so differently. To the contrary, *Meyer* specifically equated the phrase "cognizable under section 1346(b)" with the phrase "actionable under § 1346(b)," 510 U.S. at 477, which is virtually indistinguishable from Section 2676's phrase "action under section 1346(b)." If, as *Meyer* held, a claim that "alleges the six elements outlined above" is "actionable under § 1346(b)," *ibid.*, then, clearly, a complaint that alleges those six elements and asserts Section 1346(b) as the

basis for jurisdiction, as respondents' FTCA complaint did, is an "action under section 1346(b)," 28 U.S.C. 2676.

3. *Smith* and *Meyer* compel the conclusion that the phrase "an action under section 1346(b)" applies to any claim brought under Section 1346(b), even if recovery ultimately is denied based on some other provision of the FTCA. The exclusivity provisions of Section 2679(a) and (b) require dismissal of claims against defendants other than the United States before the court or the parties know whether an FTCA action against the United States under Section 1346(b) will ultimately lead to recovery. In contrast, Section 2676, at issue here, bars claims against individual employees after a plaintiff has already pursued an action under Section 1346(b) to judgment. In each case, however, the bar to other suits is defined by reference to Section 1346(b). There is no basis for the widely divergent interpretations that the Second Circuit's rule would attribute to these closely parallel phrases.

Moreover, the exclusivity provisions demonstrate the illogic of the court of appeals' reasoning, even on its own terms. The court of appeals reasoned that a dismissal based on one of the FTCA's exceptions—in this case, on the ground that the claims fell within the FTCA's detention-of-goods exception in 28 U.S.C. 2680(c)—was a dismissal "for lack of subject matter jurisdiction" and that the prior suit therefore "was not *properly* brought *under* the Federal Tort Claims Act in the first place" and rendered the FTCA action "a nullity" to which Section 2676 did not apply. Pet. App. 14a. Plainly, however, as the exclusivity provisions and this Court's decisions interpreting them make perfectly clear, there is nothing "improper" about the claimant's invoking the FTCA, the sole available basis for a tort action against the United

States, even if she is not successful in doing so. Nor does disposition of the FTCA action on the basis of one of the exceptions in Section 2680 render either the action itself or the resulting judgment a "nullity."

As respondents have conceded, under the "literal, unconditional text" of Section 2676 (Br. in Opp. 6), the judgment in their prior FTCA action under Section 1346(b) bars their present suit. The court of appeals' imposition of a further requirement that the prior judgment be on grounds other than one of the exceptions in Section 2680 is not only contrary to the text and purposes of Section 2676, it is, as the foregoing demonstrates, inconsistent with the "context and * * * terms surrounding" the judgment bar and the way this Court has interpreted those terms. *Leocal*, 125 S. Ct. at 382.

C. The Court Of Appeals' Holding That A Dismissal Based On A Section 2680 Exception Is Outside The Scope Of Section 2676 Is Inconsistent With The Structure Of The Act And The Nature Of The Exceptions In Section 2680

The court of appeals' reasoning also ignores the nature of the FTCA's exceptions. As the Second Circuit noted (Pet. App. 14a), the FTCA exceptions limit the United States' waiver of its sovereign immunity and, in that sense, constrain the courts' exercise of jurisdiction. However, the text and structure of the FTCA make clear that they are not merely jurisdictional. The FTCA's restrictions and exceptions, especially those of Section 2680, also mark substantive limitations on the United States' liability under the Act. The court of appeals' attempt to carve judgments based on Section 2680 out of the scope of the judgment bar, on the ground that such a judgment rests solely on jurisdictional bases and is therefore a "nullity," cannot be squared with the

structure of the FTCA, the nature of its exceptions, or the purpose of the judgment bar.

1. The court of appeals' premise of a clear distinction between jurisdictional and other FTCA defenses is at odds with the structure of the Act

The court of appeals' interpretation of Section 2676 presupposes a clear and meaningful distinction between judgments based on a lack of jurisdiction and judgments on other grounds, but the structure of the FTCA does not provide for any such ready distinction. For purposes of the FTCA, many grounds for denying recovery, including those set forth in Section 2680, are both jurisdictional *and* substantive.

In particular, the FTCA exceptions enumerated in Section 2680 function inseparably as jurisdictional limitations on the United States' waiver of its sovereign immunity *and* as substantive restrictions on the United States' liability under Section 2674. Section 1346(b)(1) waives the sovereign immunity of the United States for tort claims and grants the district courts jurisdiction over such claims, but does so "[s]ubject to the provisions of chapter 171," *i.e.*, 28 U.S.C. 2671 *et seq.* The provisions of "chapter 171"—including Section 2674 ("Liability of United States") and Section 2680 ("Exceptions") —in turn create and define the scope of the United States' substantive tort liability. Those provisions are referred to elsewhere in the FTCA as "the limitations and exceptions applicable" to "any action * * * pursuant to section 1346(b)." 28 U.S.C. 2679(d)(4). Because they are incorporated by reference into Section 1346(b)(1), they are *also* conditions on the waiver of sovereign immunity and limitations on the jurisdiction of the district court. But that does not deprive them of

their separate substantive character as well. Thus, Section 2680 itself provides that both the "provisions of this chapter" (*i.e.*, Chapter 171, containing the FTCA's procedural and substantive provisions) *and* "section 1346(b) of this title" (the waiver of sovereign immunity and grant of jurisdiction) "shall not apply" to claims falling within the exceptions.

This Court's own description of the exceptions set forth in Section 2680 also reflects their nature as limitations on the United States' substantive FTCA liability. In *United States* v. *Gaubert*, 499 U.S. 315 (1991), for example, the Court stated that "[t]he liability of the United States under the FTCA is subject to the various exceptions contained in § 2680," and it described Section 2680(a) as providing that "the Government is not liable for" a claim based on the performance of a discretionary function. *Id.* at 322. See also *Molzof* v. *United States*, 502 U.S. 301, 310-311 (1992) (referring to the "various statutory exceptions to FTCA liability contained in § 2680"). And, more broadly, the Court has explained that the exceptions in Section 2680 were designed to mark "the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States* v. *Varig Airlines*, 467 U.S. 797, 808 (1984).[8]

[8] The principal draftsman of Section 2680 likewise described the exceptions provided there as "exceptions to liability." See Alexander Holtzoff, *Report on Proposed Federal Tort Claims Bill* 15-16 (1931) ("In order to protect the taxpayers in this connection, * * * it is proposed to safeguard the United States by enumerating certain exceptions to liability. * * * The following is a list of the proposed exceptions to liability: [continues to list and describe exceptions, including what ultimately became Section 2680(c)]."). Although "the [Holtzoff] report was never introduced into the public record," and therefore should not be given "great weight," the Court has recognized that, "in the absence of any direct evidence regarding how members of Congress understood" the Section 2680 exceptions, it is "senseless to ignore entirely the views of its draftsman." *Kosak* v. *United States*, 465 U.S. 848, 857 n.13 (1984).

Moreover, the Court has recognized the inherently substantive nature of limitations of this sort, even though phrased in jurisdictional terms. As the Court recently explained in *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), "[w]hen a 'jurisdictional' limitation adheres to the cause of action" by "prescrib[ing] a limitation that any court entertaining the cause of action [is] bound to apply," "the limitation is essentially substantive." *Id.* at 695 n.15 (citing *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 951 (1997)). That description is particularly appropriate with respect to the limitations on the United States' liability expressed in Section 2680. Although they are jurisdictional by virtue of their incorporation into 28 U.S.C. 1346(b), they also "prescribe[] a limitation that any court entertaining the cause of action [is] bound to apply." 541 U.S. at 695 n.15.

The court of appeals' discussion of how a statute of limitations defense would be treated under its interpretation of Section 2676 underscores the unworkability of relying on an asserted distinction between "substantive" and "jurisdictional" dismissals for purposes of applying the FTCA's judgment bar. As this Court has recognized, a dismissal on statute-of-limitations grounds is a "judgment on the merits" that is treated like a "dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995). The

court of appeals in this case likewise recognized that a judgment dismissing an FTCA action on statute-of-limitations grounds *would* trigger the judgment bar. Pet. App. 14a-15a. In the special context of the FTCA, however, restrictions on a plaintiff's ability to sue the United States—including statutes of limitation—are also necessarily limitations on the United States' waiver of its sovereign immunity. See *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986) ("[w]hen the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction," including, "[i]n particular, '[w]hen waiver legislation contains a statute of limitations'") (quoting *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983)); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979). Thus, as the Second Circuit has elsewhere recognized, a dismissal on the basis of the FTCA's statute of limitations, 28 U.S.C. 2401(b), is also a dismissal for lack of jurisdiction. See *Johnson* v. *Smithsonian Inst.*, 189 F.3d 180, 189-190 (1999); *Millares Guiraldes de Tineo* v. *United States*, 137 F.3d 715, 719-720 (1998). The Second Circuit in this case failed to explain why a judgment based on lack of jurisdiction on statute-of-limitations grounds should trigger the judgment bar, while a judgment based on Section 2680(c) does not.[9]

[9] Indeed, under the FTCA, even a finding that the plaintiff's claim fails to satisfy the substantive elements of a state-law cause of action might be regarded as a dismissal for lack of jurisdiction. The FTCA provision entitled "Liability of United States," 28 U.S.C. 2674, provides that "[t]he United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances." It cannot seriously be disputed that a dismissal on the ground that state law would not provide a cause of action against a similarly situated private person would be a dismissal on the merits of the plaintiff's claim and would trigger the FTCA's judgment bar. Notably, however, 28 U.S.C. 1346(b)(1) imposes a nearly identical limitation on the grant of jurisdiction and resulting waiver of immunity, confining their scope to those circumstances in which "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Accordingly, some courts in FTCA actions have treated a determination that a private person could not be held liable under state law as a holding that the court lacks jurisdiction. See *Makarova* v. *United States*, 201 F.3d 110, 116 (2d Cir. 2000) (affirming "dismissal for lack of subject matter jurisdiction" because plaintiff "could not have brought suit against a private employer in Washington, D.C.," which made workers' compensation an exclusive remedy); *Gould Elecs., Inc.* v. *United States*, 220 F.3d 169, 192 (3d Cir. 2000) (holding that the district court "lacked subject matter jurisdiction over the indemnity claim" because "the United States would not be liable" under the law of the relevant jurisdictions). It would be absurd, however, to conclude that a judgment dismissing an FTCA action on such grounds was "a nullity," Pet. App. 14a, for purposes of the judgment bar simply because the judgment-issuing court based its rationale on the reference to the liability of private persons in Section 1346(b) rather than Section 2674.

As the foregoing discussion demonstrates, the Second Circuit's assumption that there is a significant distinction between dismissals based on an exception in Section 2680 and other types of dismissals for purposes of the FTCA's judgment bar is at odds with overall the structure of the Act. Clearly, then, it cannot serve as a basis for imposing a limitation on the scope of Section 2676's judgment bar that appears nowhere in the text of that provision.

2. The substantive nature of Section 2680's exceptions is further evidenced by the nature of the inquiry they entail

The substantive character of the FTCA's exceptions in Section 2680 is also revealed in the nature and scope of the inquiry they can require of the courts in order to

determine their application. "[I]n most instances subject-matter jurisdiction will involve no arduous inquiry." *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 587 (1999)). In contrast, judgment in the government's favor on the basis of one of the FTCA exceptions frequently comes only after extensive litigation. That is so because the determination the court must make to resolve the applicability of one of the exceptions is, in many cases, not meaningfully different from rulings in other, unquestionably merits-related, contexts. On this level, as well, the court of appeals' proposed distinction breaks down.

A review of FTCA decisions shows that, in many cases, litigation of the government's assertion of a Section 2680 exception consumes considerable time and energy on the part of the government and judiciary. Frequently, the applicability of one of the exceptions is not resolved until "after extensive discovery and a trial." *Begay* v. *United States*, 768 F.2d 1059, 1060 (9th Cir. 1985). See, *e.g.*, *Aragon* v. *United States*, 146 F.3d 819, 821 (10th Cir. 1998) ("After a four-day bench trial focusing on the discretionary function exception, the district court dismissed the case for lack of subject matter jurisdiction."). The Tenth Circuit has, in fact, adopted a general rule that, because "[t]he determination of whether the FTCA excepts the government's actions from its waiver of sovereign immunity involves both jurisdictional and merits issues," the question should be decided on summary judgment under Federal Rule of Civil Procedure 56. *Bell* v. *United States*, 127 F.3d 1226, 1228 (10th Cir. 1997) (internal quotation marks omitted). In many other cases, the government's invocation of an exception in Section 2680 is ultimately vindicated only on appeal, after the case has already been litigated to

judgment following a trial. See, *e.g.*, *Varig Airlines*, 467 U.S. at 803-804, 821; *Kelly* v. *United States*, 241 F.3d 755, 757 (9th Cir. 2001) (on appeal from judgment after trial, holding that action was barred by discretionary function exception and remanding "to dismiss * * * for lack of subject matter jurisdiction"); *Andrews* v. *United States*, 121 F.3d 1430, 1435 (11th Cir. 1997) (same).

The factual inquiry that courts have sometimes found to be necessary to determine the application of one of the exceptions in Section 2680 is due to the inherently substantive character of the inquiry. The discretionary function exception, 28 U.S.C. 2680(a), for example, presents questions that are very similar in nature to those that arise under the common-law doctrine of official immunity. Section 2680(a) provides that the United States cannot be held liable under the FTCA on a claim arising out of the performance of "a discretionary function or duty" on the part of a federal employee or agency. *Ibid.* Application of that exception involves an inquiry similar to that used to determine whether a federal employee is entitled to common-law immunity from a state-law tort claim—a non-jurisdictional defense. In *Westfall* v. *Erwin*, 484 U.S. 292 (1988), the Court held that federal officials have immunity from state-law tort liability only if "the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature." *Id.* at 300. As the Court recognized, that inquiry is "complex and often highly empirical." *Ibid.* It often may be so in the context of the FTCA as well.

These cases demonstrate that it is not uncommon for the United States to invest considerable resources (with attendant distractions to the government employee whose conduct is at issue) in defending an FTCA suit on the basis of a Section 2680 exception. Plainly, it would

be contrary to both the text and the policies underlying the FTCA's judgment bar to permit the plaintiff then to "turn around and sue" the individual employee, thereby imposing "a very substantial burden" to defend against the suit a second time. *Gilman*, 347 U.S. at 511 n.2 (quoting testimony of Assistant Attorney General Shea).

The court of appeals would apparently solve this problem by deeming a denial of relief based on Section 2680 at the summary judgment stage of the litigation a case decided "on the merits," to which the judgment bar would apply. Indeed, the court sought to distinguish *Gasho* on this basis. Pet. App. 13a. In *Gasho*, the Ninth Circuit held that *Bivens* claims arising out of the seizure of an aircraft were precluded by the judgment bar because the court had already held that an FTCA claim based on the same seizure was foreclosed by the FTCA's detention-of-goods exception. See 39 F.3d at 1433-1434, 1436, 1437-1438. Because the basis of the prior judgment in *Gasho* was the same FTCA exception that was the basis for the dismissal of respondents' FTCA action in this case, it appears that the Second Circuit's attempt to distinguish *Gasho* as decided "on the merits" was a reference to the fact that, in that case, the decision holding that Section 2680(c) foreclosed the plaintiffs' seizure claim was reached at the summary judgment stage, 39 F.3d at 1432-1433, whereas the FTCA judgment in this case was entered on a motion to dismiss for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1), Pet. App. 21a & n.2. That purported distinction, however, only underscores the extent to which the application of the judgment bar as the Second Circuit has construed it would turn on procedural fortuities having no support in the text or purposes of Section 2676.

This case, in fact, exemplifies the problem with making the operation of Section 2676 turn on such distinctions. The United States moved to dismiss respondents' FTCA action under both Rule 12(b)(1) and Rule 12(b)(6). See Pet. App. 30a. And the district court, in dismissing the FTCA claim, noted that "[w]hile the court should consider the Rule 12(b)(1) challenge first," "the United States' motion is well taken even under the more lenient Rule 12(b)(6)." *Ibid.* Although the district court later stated, on consideration of petitioners' Section 2676 motion in the *Bivens* action, that its references to Rule 12(b)(6) had been mere "dicta," *id.* at 21a n.2, the court's original discussion implicitly acknowledged that the United States' motion had both a jurisdictional and a substantive aspect. Indeed, this Court has itself articulated the standard of review for a motion to dismiss on Section 2680 grounds in the same terms as those used in Rule 12(b)(6). Compare *Gaubert*, 499 U.S. at 327 (motion to dismiss on the basis of Section 2680(a) asks "whether the allegations state a claim sufficient to survive a motion to dismiss"), with Rule 12(b)(6) (motion to dismiss for "failure to state a claim upon which relief can be granted"). The effect of a judgment for purposes of the judgment bar should not depend upon the procedural rule relied upon by the district court when it enters judgment in an FTCA action. Compare *Welch* v. *United States*, 409 F.3d 646, 649-650 (4th Cir. 2005) (district court dismissed claims for lack of jurisdiction under Rule 12(b)(1), because claims fell within 28 U.S.C. 2680(a) exception); *Jerome Stevens Pharms., Inc.* v. *FDA*, 402 F.3d 1249, 1250 (D.C. Cir. 2005) (same); *Whisnant* v. *United States*, 400 F.3d 1177, 1179 (9th Cir. 2005) (same), with *Franklin Sav. Corp.*, 180 F.3d at 1129-1130 (district court dismissed claim for failure to

state a claim under Fed. R. Civ. P. 12(b)(6) on the basis of 28 U.S.C. 2680(a)); *ALX El Dorado, Inc.* v. *Southwest Sav. & Loan Ass'n/FSLIC*, 36 F.3d 409, 410 (5th Cir. 1994) (same); *Stuto* v. *Fleishman*, 164 F.3d 820, 824-825 (2d Cir. 1999) (same), and *Bell*, 127 F.3d at 1228 (treating government's motion to dismiss on the basis of the discretionary function exception "as a Rule 56 motion for summary judgment"); *Mercado Del Valle* v. *United States*, 856 F.2d 406, 406-407 (1st Cir. 1988) (district court granted summary judgment based on 28 U.S.C. 2680(a)).[10]

Because respondents brought an FTCA action under Section 1346(b) and judgment was entered in that action, Section 2676 applies to their present *Bivens* suit. The court of appeals' holding that the judgment bar is inapplicable in these circumstances is contrary to the text and purposes of Section 2676, the settled construction of similarly worded provisions elsewhere in the FTCA, and the nature of the Section 2680 exceptions as evidenced by the Act's larger structure.

[10] The cases that have reached this Court concerning the FTCA exceptions in 2680 reflect a similar variation with respect to the rule cited in entering judgment in the government's favor based on one of the FTCA exceptions. Compare *Smith* v. *United States*, 507 U.S. 197, 199-200 (1993) (affirming district court's dismissal "for lack of subject-matter jurisdiction" because claim was barred by 28 U.S.C. 2680(k)), with *Kosak* v. *United States*, 465 U.S. 848, 851 (1984) (affirming court of appeals judgment that "petitioner had failed to state a claim on which relief could be granted" because 28 U.S.C. 2680(c) shields the United States from liability).

CONCLUSION

This Court should hold that the court of appeals had jurisdiction of petitioners' appeal under 28 U.S.C. 1291, and should reverse the judgment of the court of appeals and remand with instructions to dismiss respondents' action as barred by 28 U.S.C. 2676.

Respectfully submitted.

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AUGUST 2005

APPENDIX

1. Title 28 of the United States Code provides in pertinent part:

28 U.S.C. 1346. United States as defendant

* * * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

* * * * *

28 U.S.C. 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred[.]

* * * * *

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

* * * * *

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 U.S.C. 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

* * * * *

28 U.S.C. 2676. Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

* * * * *

28 U.S.C. 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on

claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for

any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action

or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

28 U.S.C. 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based

upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the

property was subject to forfeiture under a Federal criminal forfeiture law.[1]

* * * * *

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[1] So in original.

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No. 04-1332

IN THE

Supreme Court of the United States

RICHARD WILL, *et al.*,

Petitioners,

v.

SUSAN HALLOCK, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

The judgment bar provision of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2676, provides: "The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."

This case presents two questions:

1. Whether a court of appeals has jurisdiction over the interlocutory appeal of a district court's order denying a motion to dismiss based on the FTCA's judgment bar provision.

2. Whether section 2676 bars a subsequent case against government employees based on the same facts as a prior case, where the first case was styled as an action "under section 1346(b)" but was dismissed for lack of subject matter jurisdiction on the ground that section 1346(b) did not apply to the claim alleged.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 1

The Federal Tort Claims Act 1

Factual Background 3

Procedural Background 5

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. The Judgment Bar Extends To Government Employees The Res Judicata Effect Of A Judgment In An FTCA Case 9

A. Res Judicata Principles 9

B. Res Judicata And The FTCA's Judgment Bar.. 12

II. The Court of Appeals Did Not Have Jurisdiction Over The Interlocutory Appeal Of The District Court's Order Denying A Motion To Dismiss Based On The FTCA's Judgment Bar 16

A. The Collateral Order Doctrine Is Narrowly Construed To Uphold Section 1291's Policy Against Piecemeal Appeals 16

B. The FTCA's Judgment Bar Does Not Confer An Immunity Or A Right Not To Stand Trial 19

III. The Dismissal Of A Case On The Ground That The Court Lacks Subject Matter Jurisdiction Because The FTCA Does Not Apply To The Claim Alleged Does Not Bar A Subsequent *Bivens* Claim 26

A. The Term "Judgment" In Section 2676 Means A Decision On The Substantive Merits Of The Tort Claim 26

B. The Prior Action Was Not "Under Section 1346(b)" 41

CONCLUSION 49

TABLE OF AUTHORITIES

CASES Page

Abney v. United States,
431 U.S. 651 (1977) 24, 25

Allen v. McCurry,
449 U.S. 90 (1980) 9, 10, 12

Ardestani v. INS,
502 U.S. 129 (1991) 44

Audio Odyssey, Ltd. v. United States,
255 F.3d 512 (8th Cir. 2001) 43

Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Utility Commission,
273 F.3d 337 (3d Cir. 2001) 20

Benbow v. Wolf,
217 F.2d 203 (9th Cir. 1954) 31

Beneficial National Bank v. Anderson,
539 U.S. 1 (2003) 42

Bigelow v. Old Dominion Copper Co.,
225 U.S. 111 (1912) 10

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) 2, 47

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 10

Carlson v. Green,
446 U.S. 14 (1980) 48

Catlin v. United States,
324 U.S. 229 (1945) 17, 27

Cohen v. Beneficial Industrial Loan Corp.,
337 U.S. 541 (1949) 6, 18, 19, 22

Commissioner v. Sunnen,
333 U.S. 591 (1948) 9

Correctional Services Corp. v. Malesko,
534 U.S. 61 (2001) 47

Crist v. Bretz,
437 U.S. 28 (1978) 24

Cunningham v. Hamilton County,
527 U.S. 198 (1999) 17, 19

Dalehite v. United States,
346 U.S. 15 (1953) 14

Davis v. Michigan Department of Treasury,
489 U.S. 803 (1989) 29

Davis v. Passman,
442 U.S. 228 (1979) 47

Digital Equipment Corp. v. Desktop Direct, Inc.,
511 U.S. 863 (1994) ..... *passim*

FDIC v. Meyer,
510 U.S. 471 (1994) 8, 33, 41, 43

Farmer v. Perrill,
275 F.3d 958 (10th Cir. 2001) 16

Feres v. United States,
340 U.S. 135 (1950) 1, 26

Firestone Tire & Rubber Co. v. Risjord,
449 U.S. 368 (1981) 17

Flanagan v. United States,
465 U.S. 259 (1984) 19

Franconia Associates v. United States,
536 U.S. 129 (2002) 22, 38

Franklin Savings Corp. v. United States,
180 F.3d 1124 (10th Cir. 1999) 43

Freeze v. United States,
343 F. Supp. 2d 477 (M.D.N.C. 2004) 40

Gasho v. United States,
39 F.3d 1420 (9th Cir. 1994) 16

Gonzalez v. Crosby,
125 S. Ct. 2641 (2005) 22

Gustafson v. Alloyd Co.,
513 U.S. 561 (1995) 29

Gutierrez de Martinez v. Lamagno,
515 U.S. 417 (1995) 15, 23, 34, 39, 40

Henderson v. Bluemink,
511 F.2d 399 (D.C. Cir. 1974) 20

Hennessy v. Daniels Law Office,
270 F.3d 551 (8th Cir. 2001) 27

Hughes Aircraft Co. v. United States ex rel. Schumer,
520 U.S. 939 (1997) 36

Irwin v. Department of Veterans Affairs,
498 U.S. 89 (1990) 38

Jarrard v. CDI Telecommunications, Inc.,
408 F.3d 905 (7th Cir. 2005) 11

Johnson v. Smithsonian Institute,
189 F.3d 180 (2d Cir. 1999) 37

King v. St. Vincent's Hospital,
502 U.S. 215 (1991) 29

Kosak v. United States,
465 U.S. 848 (1984) 41

Lauterbach v. United States,
95 F. Supp. 479 (W.D. Wash. 1951) 15

Lober v. Moore,
417 F.2d 714 (D.C. Cir. 1969) 10

Mayle v. Felix,
125 S. Ct. 2562 (2005) 22

McCarthy v. Bronson,
500 U.S. 136 (1991) 29

Mitchell v. Forsyth,
472 U.S. 511 (1985) 23

Monell v. New York City Department of Social Services, 436 U.S. 658 (1978) 25

Montana v. United States,
440 U.S. 147 (1979) 12

Montero-Martinez v. Ashcroft,
277 F.3d 1137 (9th Cir. 2001) 27

Nixon v. Fitzgerald,
457 U.S. 731 (1982) 23

Nordby v. Anchor Hocking Packaging Co.,
199 F.3d 390 (7th Cir. 1999) 27

Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.,
292 U.S. 386 (1934) 42

Park Lake Resources Ltd. Co. v. Department of Agriculture, 378 F.3d 1132 (10th Cir. 2004) 12

Parklane Hosiery Co. v. Shore,
439 U.S. 322 (1979) 10, 13

Republic of Austria v. Altmann,
541 U.S. 677 (2004) 36

Scarborough v. Principi,
541 U.S. 401 (2004) 35, 37

Schlesinger v. Councilman,
420 U.S. 738 (1975) 11

Sell v. United States,
539 U.S. 166 (2003) 18

Semtek International Corp. v. Lockheed Martin Corp.,
531 U.S. 497 (2001) 32, 37, 38

Sosa v. Alvarez-Machain,
542 U.S. 692, 124 S. Ct. 2739 (2004) 13

Sullivan v. Finkelstein,
496 U.S. 617 (1990) 28

Sunshine Anthracite Coal Co. v. Adkins,
310 U.S. 381 (1940) 11

Swint v. Chambers County Commission,
514 U.S. 35 (1995) 17, 18, 19, 21, 25

United States v. F. & M. Schaefer Brewing Co.,
356 U.S. 227 (1958) 28

United States v. Gilman,
347 U.S. 507 (1954) 31

United States v. Hollywood Motor Car Co.,
458 U.S. 263 (1982) 17

United States v. Kubrick,
444 U.S. 111 (1979) 37

United States v. Mitchell,
463 U.S. 206 (1983) 33

United States v. Moser,
266 U.S. 236 (1924) 13

United States v. Nunnally,
316 U.S. 258 (1942) 11

United States v. Pink,
315 U.S. 203 (1942) 10

United States v. Ryan,
402 U.S. 530 (1971) 19

United States v. Smith,
499 U.S. 160 (1991) 8, 44, 45, 46, 47

Westfall v. Erwin,
484 U.S. 292 (1988) 2, 24

White v. New Hampshire Department. of Employment Security, 455 U.S. 445 (1982) 28

Zipes v. Trans World Airlines,
455 U.S. 385 (1982) 37

STATUTORY MATERIALS

Federal Employees Liability Reform and Tort Compensation Act of 1988,
Pub. L. No. 100-694, 102 Stat. 4564 (1988) ... 2, 23

5 U.S.C. § 552(a)(4)(B) 34

18 U.S.C. § 2252 3

18 U.S.C. § 2252A 3

21 U.S.C. § 332 34

28 U.S.C. § 1291 ..... 17, 18, 21, 25

28 U.S.C. § 1292(a)(1) 28

28 U.S.C. § 1292(b) 21
28 U.S.C. § 1346(b) ..... *passim*
28 U.S.C. § 2071 18
28 U.S.C. § 2072 19
28 U.S.C. § 2401(a) 22
28 U.S.C. § 2401(b) 2, 22, 37
28 U.S.C. § 2672 ..... 2, 5, 15, 29, 30
28 U.S.C. § 2674 ..... 15, 29
28 U.S.C. § 2675(a) 40
28 U.S.C. § 2676 ..... *passim*
28 U.S.C. § 2678 30
28 U.S.C. § 2679(a) 43
28 U.S.C. § 2679(b) 7, 23, 24, 34
28 U.S.C. § 2679(b)(1) 2, 44, 45, 46, 48
28 U.S.C. § 2679(b)(2) 3, 45, 46, 48
28 U.S.C. § 2679(d) 46
28 U.S.C. § 2679(d)(1) 3, 40
28 U.S.C. § 2679(d)(4) 46
28 U.S.C. § 2679(d)(5) 3, 40
28 U.S.C. § 2680 ..... *passim*
28 U.S.C. § 2680(c) 1, 5, 41
28 U.S.C. § 2680(h) 5, 48
30 U.S.C. § 818(b) 34

46 U.S.C. App. § 741 11

46 U.S.C. App. § 781 11

Hearings Before the House Committee on the Judiciary, 77th Cong., 2d Sess. (Jan. 29, 1942) ..... *passim*

H.R. Rep. No. 79-1287 (1945) 31

RULES

Federal Rule of Civil Procedure 41(b) 32

Federal Rule of Civil Procedure 54(a) 27, 28

Federal Rule of Civil Procedure 54(d)(2) 28

Federal Rule of Civil Procedure 58 28

Federal Rule of Civil Procedure 58, advisory committee note (2002) 28

Federal Rule of Civil Procedure 68 27

Federal Rules of Civil Procedure, Form 32 28

RESTATEMENTS AND TREATISES

Restatement (First) of Judgments (1942) 10, 13

Restatement (Second) of Judgments (1982) 12

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INTRODUCTION

Richard Hallock was the victim of identity theft. Unknown to him, his credit card information was used to pay the subscription fee for a website that displayed child pornography. Agents of the United States Customs Service, investigating the website, traced the payment to Mr. Hallock's credit card, obtained a warrant to search his residence, and seized all of the computer equipment at the home. Much of that equipment was the property of respondent Ferncliff Associates, a computer software business owned by respondent Susan Hallock, Richard Hallock's wife. When the computers were returned to the Hallocks six months later, the hard drives of several had been destroyed beyond repair. As a result, Ferncliff Associates was forced to go out of business. Eventually, a computer expert hired by the Hallocks concluded that the computer damage was intentional. In this case, alleging a *Bivens* claim for intentional violations of their constitutional rights, Susan Hallock and Ferncliff Associates are seeking compensation from the individual agents responsible for the destruction of their property and resulting demise of their business.

STATEMENT OF THE CASE

The Federal Tort Claims Act

The Federal Tort Claims Act ("FTCA") "marks the culmination of a long effort to mitigate the unjust effects of sovereign immunity from suit." *Feres v. United States*, 340 U.S. 135, 139 (1950). Enacted in 1946, the FTCA gives federal courts jurisdiction over damages suits against the United States for torts committed by federal employees in the scope of their employment. 28 U.S.C. § 1346(b). The waiver of sovereign immunity is subject to exceptions for claims arising in 14 specific areas, set forth in section 2680. For example, and most relevant to this case, the waiver does "not apply" to claims arising from the detention of goods. *Id.* § 2680(c).

Before bringing suit under the FTCA, a claimant must file an administrative claim with the agency for which the employee worked at the time of the tortious act. *Id.* § 2672. The claim must be filed within two years of the conduct at issue, and any lawsuit must be filed within six months of the agency's denial of the claim. *Id.* § 2401(b). The claimant's acceptance of an award or settlement during the administrative process constitutes a complete release of any claim based on the same act or omission against the United States and the employee involved. *Id.* § 2672.

The FTCA further provides:

> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

Id. § 2676. As discussed in more detail below, *see infra* pp. 12-16, this provision, known as the FTCA's "judgment bar," was intended to extend to the employee the res judicata effect of a judgment in an FTCA case.

In 1988, this Court held that federal employees were not immune from state-law tort liability for conduct covered by the FTCA. *See Westfall v. Erwin*, 484 U.S. 292, 297-98 (1988). Congress reacted by passing the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4564 (1988), commonly referred to as the Westfall Act. The Westfall Act added to the FTCA an "exclusive remedy" provision, 28 U.S.C. § 2679(b)(1), which precludes suit against federal employees for most tortious conduct committed within the scope of their employment. The exclusive remedy provision does not apply either to actions for constitutional violations brought under *Bivens v. Six Unknown*

Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), or to actions for violations of federal statutes that authorize suit against individual employees. 28 U.S.C. § 2679(b)(2).

Under the Westfall Act, if a claimant files a state-law tort suit against a federal employee and the Government certifies that the employee was acting within the scope of his employment at the time of the incident at issue, the Government will be substituted in as the defendant. *Id.* § 2679(d)(1). If the claimant has not previously filed an administrative claim, the case will be dismissed without prejudice to allow the claimant an opportunity to exhaust the administrative remedy. *Id.* § 2679(d)(5).

Factual Background

Ferncliff Associates was a computer software business owned by Susan Hallock, through which her husband Richard Hallock developed and sold software programs. In early 2000, Mr. Hallock's credit card number was used, without his knowledge and by someone unknown to him, to pay the subscription fee for an Internet website. That website was used to display child pornography, in violation of 18 U.S.C. §§ 2252 and 2252A. JA 30-31. United States Customs Service agents became aware of the website and commenced an investigation, which led them to Mr. Hallock's credit card and so to Mr. Hallock. In June 2000, the Customs Service obtained a search warrant for the Hallock residence. *Id.*

Pursuant to the search warrant, armed federal law enforcement officers entered the home of Richard and Susan Hallock and seized all the computer equipment and personal and business records in the house. Because the Hallock residence also served as the office of Ferncliff Associates, when the computers and other records were seized, so were software design files, intellectual property including computer source

code (*i.e.*, software programming codes), client files, and other proprietary material necessary to the functioning of Ferncliff Associates. *Id.* The agents seized both the primary files and the backups. *Id.* at 31. Without that material and, in particular, the computer source code, the business could not operate.

The Customs Service kept the computer equipment for several months. During that time, it made a copy of each of the internal and removable hard drives. *Id.* at 32. It later examined the data on the hard drives to determine whether the computers had been used in connection with the child pornography website and found no evidence of such use. Pet. App. 4a. Eventually, the investigation was closed, and no charges were brought against Mr. Hallock. JA 31.

On September 11 and September 15, 2000, an Assistant United States Attorney offered to return the computers if Mr. Hallock would sign an agreement prepared by her office. *Id.* at 32. Mr. Hallock objected to language in the agreement, including language releasing the Government and its employees from any damage caused to the property while it was in custody and language agreeing that the Government had made accurate copies of the information in the computers (copies that Mr. and Mrs. Hallock were not permitted to see). *See* 2d Cir. App. A-21 to A-26. The agents therefore did not return the computers. Eventually, in December 2000, Customs Service agents returned all the seized property, without requiring either Richard or Susan Hallock to sign any agreement. JA 32. Within hours, Richard Hallock discovered that four of the nine seized computers had been irreparably damaged and that five hard drives had been damaged to such an extent that the files, records, and computer source code on those drives had been completely eradicated. *Id.* at 33.

Although the United States Attorney's office confirmed the existence of copies of the hard drives several times between

September 2001 and April 2005, Richard and Susan Hallock's repeated requests for a copy of the copies of their own hard drives were rejected by both the Customs Service agents and the United States Attorney's office. The loss of the computer data and source codes was fatal to Ferncliff Associates, which was forced to close. JA 33.

Procedural Background

In October 2001, Susan Hallock and Ferncliff Associates (collectively, "Hallock") filed an administrative claim under the Federal Tort Claims Act, 28 U.S.C. § 2672, seeking compensation for the loss of their hard drives, including the loss of their intellectual property and resulting loss of business. They received no response to the administrative claim. In July 2002, they sued the United States, alleging various torts and citing the FTCA's jurisdictional provision, 28 U.S.C. § 1346(b). In October 2002, they filed an amended complaint.

Shortly thereafter, the United States moved to dismiss for lack of subject matter jurisdiction and failure to state a claim on which relief can be granted on the grounds that each of the claims was barred by one of two exceptions to section 1346: sections 2680(c) and 2680(h). Section 2680(c) provides that section 1346(b) "shall not apply to" any claim "arising in respect of . . . the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law-enforcement officer," and section 2680(h) provides that section 1346(b) "shall not apply to" any claim arising out of interference with contract rights, among other things.

Hallock sought leave to amend the complaint to add the individual government employees as defendants and to state a *Bivens* claim. That request was denied without prejudice. NDNY No. 02-942, Dkt. #17 (Dec. 23, 2002). On March 21, 2003, the district court granted the motion to dismiss. The

court found that all of the claims arose from the detention of goods and, therefore, fell within the scope of section 2680(c). Pet. App. 38a-39a. Because the United States has not waived sovereign immunity with respect to such claims, the court held that it lacked subject matter jurisdiction and dismissed the case. *Id.*

Meanwhile, on February 13, 2003, Hallock filed this *Bivens* action against the individual employees involved in the seizure, detention, and destruction of the property (Petitioners here). JA 6. The case was filed in the same court and assigned to the same judge. Pet. App. 18a, 27a. In support of the *Bivens* claim, Hallock later submitted an affidavit and report of a computer expert who had performed a forensic analysis of the hard drives and concluded that they had been intentionally damaged. *See* 2d Cir. App. A-35 to A-36, A-42.

Petitioners moved to dismiss based on the FTCA's judgment bar, 28 U.S.C. § 2676. JA 10; *see supra* p. 2. The district court denied the motion. JA 37. The court held that the judgment bar does not apply when the prior FTCA claim has been dismissed for lack of subject matter jurisdiction. The court reasoned that the concerns behind the judgment bar did not apply in such circumstances. Pet. App. 24a.

The Second Circuit affirmed. The court of appeals first considered whether it had jurisdiction over the defendants' interlocutory appeal. Analogizing the district court's order to an order denying qualified immunity, the court held that the order was a collateral order appealable under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Pet. App. 9a-11a.

Turning to the applicability of the judgment bar, the court of appeals focused on the language of section 2676, which states that the bar is triggered by a "judgment in an action under section 1346(b)" of the FTCA. The court held that

where an action is brought that does not fit within the category of cases to which section 1346(b) applies, the judgment bar is not triggered. Because "a judgment declaring a lack of subject matter jurisdiction denotes that sovereign immunity has not been waived and that the case is not justiciable in any event," such a judgment is not in "an action under section 1346(b)" for purposes of the judgment bar. Pet. App. 14a.

SUMMARY OF ARGUMENT

1. The FTCA's judgment bar, 28 U.S.C. § 2676, extends the res judicata effect of a judgment in an FTCA action to the federal employee whose act formed the basis for the FTCA claim. The statutory language mimics the language of res judicata, which is also a "judgment bar." Furthermore, the purpose of section 2676, its legislative history, and legal commentary soon after its passage all reflect the understanding that the FTCA's judgment bar is a res judicata provision. This understanding is central to resolving both questions presented.

2. The district court's denial of Petitioners' motion to dismiss based on the judgment bar did not satisfy the stringent requirements of the collateral order doctrine. This Court has expressly rejected the notion that orders denying res judicata defenses are immediately appealable. Although Petitioners characterize the judgment bar as an "immunity" and a "right not to stand trial," it is neither. Indeed, both Congress and this Court have identified a separate FTCA provision, section 2679(b), as providing an "immunity" from tort suits for federal employees for conduct within the scope of their employment. Neither has used that term to describe section 2676. Rather, section 2676 is a res judicata defense, which bars a subsequent action when a prior action has been litigated to a judgment on the merits.

Almost every defense that could form the basis for pretrial dismissal might conceivably be described as a "right

not to stand trial." However, as the Court has repeatedly stated, only a few of those defenses cannot be effectively reviewed following final judgment. Petitioners' section 2676 defense is not one of those few.

3.a. "Judgment" does not have a uniform meaning. Accordingly, in construing the meaning of the term as it appears in section 2676, it is necessary to consider the context of the provision, and the structure and purposes of the FTCA in general and section 2676 in particular. In section 2676, the word "judgment" is best construed to mean "judgment on the merits of the tort claim." This reading is consistent with the other uses of "judgment" in the FTCA and with the res judicata principles at the heart of section 2676. This reading also avoids the scenarios in which Petitioners' interpretation would force a dismissal of a case in circumstances that would undermine the FTCA's objectives. Because the judgment in Hallock's prior case was unrelated to the merits of the underlying tort claims, the judgment bar does not preclude this action.

b. The conclusion that the judgment bar does not apply here also follows from the statutory language providing that the bar comes into play only where the plaintiff has previously obtained a judgment "in an action under 1346(b)." In Hallock's prior case, the judgment was based on a finding that the claims arose from the detention of goods and thus that they were excepted by section 2680(c) from the jurisdictional grant of section 1346(b). That is, the case was dismissed because, pursuant to section 2680, section 1346(b) did "not apply." An action cannot be at once "under section 1346(b)" and one to which "section 1346(b) shall not apply." Therefore, as the Second Circuit held, the judgment in the prior case did not trigger the judgment bar. Neither *FDIC v. Meyer*, 410 U.S. 471 (1994), nor *United States v. Smith*, 499 U.S. 160 (1990), each of which addressed provisions other than section 2676 and

focused on the context and purposes of those other provisions, is inconsistent with the Second Circuit's holding.

ARGUMENT

The language, purpose, and legislative history of the FTCA's judgment bar, 28 U.S.C. § 2676, all show that the judgment bar was intended to extend the traditional principles of res judicata to cover the government employees whose conduct underlies an FTCA claim. An understanding of the res judicata foundation of the judgment bar resolves both questions presented in favor of Hallock.

I. The Judgment Bar Extends To Government Employees The Res Judicata Effect Of A Judgment In An FTCA Case.

A. Res Judicata Principles

Under traditional principles of res judicata, or claim preclusion, "a final judgment on the merits of an action precludes parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). "The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties." *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948). Thus, after a plaintiff loses a case, his "entire claim is barred by the judgment, even as to evidence theories, arguments, and remedies that were not advanced in the first litigation." 18 Wright, Miller & Cooper, *Federal Practice & Procedure* § 4406, at 141 (2d ed. 2002).[1]

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[1]The related doctrine of collateral estoppel, or issue preclusion, bars a party from relitigating in a second case an issue that was litigated, decided, and necessary to the judgment

(continued...)

Historically, federal law applied res judicata principles to subsequent litigation of the same claim only when the parties to the second action were either the parties or in privity with the parties to the first action. This limitation was known as mutuality. "Under this mutuality doctrine, neither party could use a prior judgment as an estoppel against the other unless both parties were bound by the judgment." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-27 (1979). Although this requirement has eroded over time, *see id.* at 326-28, at the time the FTCA was enacted, the federal courts required mutuality. *See United States v. Pink*, 315 U.S. 203, 216 (1942); *Bigelow v. Old Dominion Copper Co.*, 225 U.S. 111, 127 (1912); *see also Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313, 326 (1971) ("As late as 1961, eminent authority stated that '[m]ost state courts recognize and apply the doctrine of mutuality, subject to certain exceptions . . . . And the same is true of federal courts, when free to apply their own doctrine.'") (alterations in original; citation omitted); Restatement (First) of Judgments § 93 (1942) (non-party or privy to prior action "not bound by or entitled to claim the benefits of an adjudication upon any matter decided in the action").

The mutuality requirement, however, was long subject to exceptions, even before it fell into disfavor. One "well defined" exception applied where liability in either the first or the second case was based on respondeat superior. *Lober v. Moore*, 417 F.2d 714, 717-18 (D.C. Cir. 1969). In those circumstances, the resolution of the claim in the first case as against the employer would be res judicata in a second case against the employee, and vice versa. *Id.* at 717-18 & nn.28-30 (stating rule and citing cases). Prior to enactment of the FTCA,

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[1](...continued)
in a prior case. *Allen*, 449 U.S. at 94.

however, the federal Government was immune from liability for the tortious acts of its employees in the scope of their employment. Therefore, the application of res judicata in "respondeat superior" situations involving the Government had not been addressed.[2]

Although res judicata generally bars litigation of claims that were brought, or could have been brought, in a prior case, the doctrine does not apply when the first case was dismissed for lack of subject matter jurisdiction. *Schlesinger v. Councilman*, 420 U.S. 738, 747 (1975) (where court lacks subject matter jurisdiction, judgment in case has no res judicata effect); *Jarrard v. CDI Telecomm., Inc.*, 408 F.3d 905, 916 (7th Cir. 2005) ("The Board's dismissal on the basis of jurisdiction certainly did not amount to a full and final adjudication on the merits of Jarrard's tort claims, so res judicata, or claim

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[2]Before 1946, the Government could be sued in tort in certain limited circumstances defined by statutes such as the Public Vessels Act, 46 U.S.C. App. § 781 (1925), and the Suits in Admiralty Act, 46 U.S.C. App. § 741 (1920), which allowed suit against the Government for certain maritime torts. However, whether a ruling in a case brought against the Government under such a statute would preclude a claim against the employee involved had not been addressed in cases under those acts. *But compare United States v. Nunnally*, 316 U.S. 258 (1942) (judgment in suit against collector of Internal Revenue to recover overpayment of taxes is not res judicata with respect to subsequent action against United States to recover same overpayment), *with Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940) (judgment against government officer that is binding on United States is res judicata as to a second suit by same plaintiff raising same issue against another government officer).

preclusion, clearly does not apply here."); 18A Wright, Miller & Cooper, *supra*, § 4436, at 150 (describing "well settled" rule). In those circumstances, the preclusive effect of the judgment of dismissal extends only to the issue of subject matter jurisdiction, but not to other matters that were or could have been raised in the case. *Park Lake Res. Ltd. Co. v. Department of Agric.*, 378 F.3d 1132, 1136 (10th Cir. 2004); Restatement (Second) of Judgments § 12 cmt. c (1982). In other words, the decision in the first case will be given collateral estoppel effect but not res judicata effect.

This understanding of the preclusive effect of a dismissal based on lack of subject matter jurisdiction underlies the Court's repeated statements that res judicata applies where a prior case was decided "on the merits," *see, e.g.*, *Allen*, 449 U.S. at 94; *Montana v. United States*, 440 U.S. 147, 153 (1979), and is consistent with the purpose of the res judicata doctrine: "preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate." *Montana*, 440 U.S. at 153; *see Allen*, 449 U.S. at 94 (res judicata "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication").

B. Res Judicata And The FTCA's Judgment Bar

Res judicata is primarily a creation of the common law, but various federal statutes invoke res judicata principles. 18 Wright, Miller & Cooper, *supra*, § 4403, at 35 & n.23. The FTCA is one such statute. *Id.* at 35 n.23. Again, section 2676 provides:

> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee

> of the government whose act or omission gave rise to the claim.

The language of section 2676—"judgment" and "bar"—is classic res judicata terminology. *See, e.g., Parklane Hosiery Co.*, 439 U.S. at 326 n.5 ("Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action."); *United States v. Moser*, 266 U.S. 236, 241 (1924) (where res judicata applies, "judgment upon the merits constitutes an absolute bar" to subsequent action); Restatement (First) of Judgments, *supra*, Ch. 3, Introductory Note ("When it is stated that 'the rules of res judicata are applicable,' it is meant that the rules as to the effect of a judgment as a merger or as a bar . . . are applicable."); *id.* § 48 (section entitled "Judgment for Defendant On The Merits—Bar"); 18 Wright, Miller & Cooper, *supra*, § 4402, at 7 (discussing "Terminology of Res Judicata").

The purpose and legislative history of the FTCA also demonstrate that section 2676 was intended to extend the res judicata effect of a judgment on the merits in an FTCA case to federal employees. The FTCA was enacted "primarily to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, 2747 (2004) (quoting *Richards v. United States*, 369 U.S. 1, 6 (1962)); *see* Hearings Before the House Committee on the Judiciary, 77th Cong., 2d Sess. 30 (Jan. 29, 1942) (hereinafter "Hearings") (FTCA "will place the United States, in respect of torts committed by its agents, upon the same footing as a private corporate employer, with certain limitations required for the protection of important governmental functions"). In one of its few references to the judgment bar, the legislative history states: "Judgment in a tort

action constitutes a bar to further action upon the same claim, *not only against the Government* (as would have been true under [the prior version of the bill] H.R. 5373) but also against the delinquent employee . . . ." Hearings, *supra*, at 27 (emphasis added). The prior version of the bill, like the later version, did not expressly address a "bar" on "further action . . . against the Government," *see id.* at 2-3, 58, 60 (H.R. 5373). Thus, the reference in the legislative history to a "bar to further action upon the same claim . . . against the Government" under H.R. 5373 must mean the ordinary res judicata effect that would result from a judgment in an FTCA action.[3]

As discussed above, non-mutual res judicata was generally disfavored in 1946, and the application of non-mutual res judicata in a tort case against a federal employee where the Government was the defendant in a prior suit based on the same negligent conduct had not been addressed by the courts. *See supra* pp. 10-11 & n.2. Consequently, when Congress enacted the FTCA, a judgment on the merits in favor of the United States in an FTCA suit would not clearly have barred a subsequent suit by the same plaintiff against the government employee whose conduct gave rise to the claim. Absent a judgment bar, the employee might have been sued in tort if the plaintiff did not prevail against the United States. Moreover, absent the judgment bar, if the plaintiff won the FTCA suit, he

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[3]The 79th Congress, which passed the FTCA, held no hearings on the bill. This Court therefore has relied on the hearings of the 77th Congress. *Dalehite v. United States*, 346 U.S. 15, 26-27 (1953). The bulk of the hearing report consists of the testimony of an Assistant Attorney General, who explained the Attorney General's proposed amendments to H.R. 5373, one of which was the addition of the judgment bar. Hearings, *supra*, at 1, 3.

then might have filed a second suit against the employee seeking, for example, punitive damages, which are not available against the Government. *See* 28 U.S.C. § 2674.

Permitting a second suit in either of these situations would have defeated one of the central purposes of the FTCA. *See Lauterbach v. United States*, 95 F. Supp. 479 (W.D. Wash. 1951) ("object of surrender of immunity" in FTCA was "to relieve employees of liability in cases in which the doctrine of respondeat superior would apply if the United States were a private corporation"); *see also Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995) ("Generally, [FTCA] cases unfold much as cases do against employers who concede *respondeat superior* liability."). To prevent a claimant from litigating his state-law tort suit a second time, Congress enacted the judgment bar, which releases the employee from tort liability upon resolution of the underlying tort claim, for "[i]t is just and desirable that the burden of redressing wrongs of this character be assumed by the Government alone." Hearings, *supra*, at 26, 27.[4]

Not surprisingly, in light of the purposes of the FTCA, legal commentary soon after passage of the Act construed the

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[4]The language quoted in the text above appears in a discussion of section 2672, which provides that an administrative award to the claimant constitutes "a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter." The legislative history of the judgment bar explains that the provision was drafted "for reasons already discussed in respect of administrative adjustments of claims." Hearings, *supra*, at 27. The quoted language is the entirety of the "reasons already discussed" in this portion of the hearing report.

judgment bar in accordance with res judicata principles. One early commentator noted that the bar "applies only to judgments rendered on the merits" and cautioned that it "should not be interpreted as referring to any judgment by which the court denied its jurisdiction." Note, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 559 (1947). This conclusion was based on the understanding that the judgment bar was a res judicata provision and that a judgment based on lack of jurisdiction "cannot be res judicata of the issues involved in the action." *Id.* 559 & n.170; *accord* Street, *Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act*, 47 Mich. L. Rev. 341, 358 (1949) (FTCA extends common law rules of res judicata to non-party employees).[5]

II. The Court of Appeals Did Not Have Jurisdiction Over The Interlocutory Appeal Of The District Court's Order Denying A Motion To Dismiss Based On The FTCA's Judgment Bar.

A. The Collateral Order Doctrine Is Narrowly Construed To Uphold Section 1291's Policy Against Piecemeal Appeals.

Congress has strictly limited appeals as of right within the federal courts to appeals from "final decisions of the district

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[5]Two of the court of appeals decisions on which Petitioners heavily rely also recognize that section 2676 reflects res judicata principles, although they fail to apply those principles in construing the provision. *See Farmer v. Perrill*, 275 F.3d 958, 960 (10th Cir. 2001) (reversing district court decision "under the Section 2676 equivalent of claim preclusion"); *Gasho v. United States*, 39 F.3d 1420, 1438 n.17 (9th Cir. 1994) (suggesting section 2676 applies to judgment "on the merits" and analogizing to res judicata).

court." 28 U.S.C. § 1291. The general rule is that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (citations omitted); *see also Cunningham v. Hamilton County*, 527 U.S. 198, 203 (1999) (section 1291 "descends from the Judiciary Act of 1789, where the First Congress established the principle that only final judgments and decrees of the federal district courts may be reviewed on appeal") (citation and internal quotation marks omitted). A decision is ordinarily considered final and appealable under section 1291 only if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945).

The final judgment rule serves several salutary purposes. By consolidating in one appeal all of the grounds for challenging a trial court's judgment, the rule avoids delay, promotes efficient judicial administration, and reduces the ability of litigants to harass opponents by engaging in a succession of time-consuming and costly appeals. And because many cases settle or are resolved on other grounds in favor of the potential appellant, the rule avoids many appeals entirely. It also gives effect to Congress's determination that litigation is best managed at both the trial and appellate levels if the district courts are free from repeated second-guessing by the courts of appeals during the pendency of a case. *See Cunningham*, 527 U.S. at 203-04; *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). For these reasons, "the policy of Congress embodied in [section 1291] is inimical to piecemeal appellate review of trial court decisions." *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982).

Nonetheless, section 1291 has been interpreted by the Court to authorize appeals in a "small category" of trial court orders that do not end the litigation. *Swint v. Chambers County*

Comm'n, 514 U.S. 35, 42 (1995). Under the collateral order doctrine first articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949), that small category "includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint*, 514 U.S. at 42 (citing *Cohen*, 337 U.S. at 546).[6]

In light of the language of section 1291 and the historic policy against piecemeal appellate review, this Court has "repeatedly stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule." *Digital*, 511 U.S. at 868. Thus, "the conditions for collateral order appeal [are] stringent," and "the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a particular injustice averted, by a prompt appellate court decision." *Id.* (citation omitted and internal quotation marks omitted). The Court has singled out the denial of a motion to dismiss based on res judicata as an example of an order for which interlocutory review is not appropriate. *Id.* at 873.

Moreover, in the 1990 and 1992 amendments to the Rules Enabling Act, 28 U.S.C. § 2071, Congress "empowered this Court to clarify when a decision qualifies as 'final' for appellate review purposes, and to expand the list of orders appealable on an interlocutory basis." *Swint*, 514 U.S. at 48

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[6]The collateral order doctrine has no basis in the text of section 1291, *see Sell v. United States*, 539 U.S. 166, 189 n.4 (2003) (Scalia, J., dissenting), but the Court has described the doctrine as a "practical construction" of section 1291. *Digital*, 511 U.S. at 867.

(discussing 28 U.S.C. §§ 2072(c) & 1292(e)). Significantly, however, "[t]he procedure Congress ordered for such changes . . . is not expansion by court decision, but by rulemaking under § 2072." *Id.* The Court has since recognized that "Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's full respect." *Cunningham*, 527 U.S. at 210 (quoting *Swint*, 514 U.S. at 48).

B. The FTCA's Judgment Bar Does Not Confer An Immunity Or A Right Not To Stand Trial.

Here, as in many cases in which litigants attempt to invoke the collateral order doctrine, the central issue is whether the third prong of the *Cohen* test has been met—that is, whether the decision would be "effectively unreviewable" after final judgment. If this condition is not satisfied, immediate appeal under section 1291 is foreclosed. *Digital*, 511 U.S. at 869. As this Court has explained, the third prong is satisfied only when strict observance of the final judgment rule "would render impossible any review whatsoever," *United States v. Ryan*, 402 U.S. 530, 533 (1971), or "would practically defeat the right to any review at all." *Flanagan v. United States*, 465 U.S. 259, 265 (1984) (citation omitted).

Petitioners' invocation of the collateral order doctrine is based on their theory that the FTCA's judgment bar is analogous to well-established immunities, such as Eleventh Amendment immunity, Speech or Debate Clause immunity, or qualified immunity, which confer a right not to stand trial. The better analogy, however, is to statute of limitations defenses, defenses based on denial of the Sixth Amendment right to a speedy trial, defenses based on releases in agreements between the parties, and, most relevant here, defenses based on res

judicata. Trial court orders addressing these defenses are not immediately appealable, *Digital*, 511 U.S. at 873, and the Court's jurisprudence on the collateral order doctrine calls for the same result with respect to a defense based on section 2676.

As discussed above, *supra* pp. 13-16, the FTCA's judgment bar codifies and extends res judicata principles. Like res judicata doctrine, and unlike immunities, the judgment bar prohibits an action only when a prior suit has already been litigated to judgment and does not generally protect federal officials against actions (such as *Bivens* actions) for which the FTCA is not the exclusive remedy. *See Henderson v. Bluemink*, 511 F.2d 399, 404 (D.C. Cir. 1974) (section 2676 "proscribes a double recovery, not a suit against the individual employee in the first instance").

The res judicata foundation of section 2676 is dispositive here, for *Digital* expressly identified "claims . . . that an action is barred on claim preclusion principles" as among the sort—such as claims that a statute of limitations has run or that the complaint fails to state a claim as a matter of law—that could broadly be characterized as involving a "right not to stand trial," but which does not satisfy the third prong of the *Cohen* test. 511 U.S. at 873. If orders denying res judicata defenses were deemed collateral orders, "it would be no consolation that a party's meritless . . . res judicata claim was rejected on immediate appeal; the damage to the efficient and congressionally mandated allocation of judicial responsibility would be done, and any improper purpose the appellant might have had in saddling its opponent with cost and delay would be accomplished." *Id.*; *see also Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Utility Comm'n*, 273 F.3d 337, 345 (3d Cir. 2001) ("An examination of the doctrine of res judicata or claim preclusion reveals that it is better understood as a defense against liability, not an absolute guarantee against having to face a suit. Claim preclusion entitles a party to rely on prior

judicial decisions and not to be held liable on claims on which that party previously has prevailed.").

"[L]imiting the focus to whether the interest asserted may be called a 'right not to stand trial' [does not] offer much protection against the urge to push the § 1291 limits" because "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" *Digital*, 511 U.S. at 873. Yet few such rights satisfy the "stringent" conditions for collateral order appeal. *Id.* at 868. To the contrary, the Court has been "emphatic in recognizing that the jurisdiction of the courts of appeals should not, and cannot, depend on a party's agility in [] characterizing the right asserted" as one that "would be 'irretrievably lost' if review were confined to final judgments only." *Id.* at 871-72 (citation omitted). The "core point" is that "§ 1291 requires courts of appeals to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Swint*, 514 U.S. at 43 (quoting *Digital*, 511 U.S. at 873).[7]

For example, like section 2676, statutes of limitations are often framed in terms of a "bar" to an action upon the

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[7]Petitioners correctly note (at 18 n.1) that the district court's denial of their request for certification of the court's order for immediate interlocutory appeal under 28 U.S.C. § 1292(b) is irrelevant to the question whether the particular order at issue is appealable as of right under 28 U.S.C. § 1291. The existence of section 1292(b), however, is relevant more generally in any case concerning the breadth of section 1291 because it—and not the collateral order doctrine—provides a "safety valve" for appeal of interlocutory orders involving "controlling question of law [that] . . . may materially advance the ultimate termination of the litigation." *Digital*, 511 U.S. at 883 (quoting § 1292(b)).

occurrence of a condition—the passage of a fixed period of time. *See, e.g.*, 28 U.S.C. § 2401(a) (civil "action" against United States "barred" unless filed within six years of accrual); *id.* § 2401(b) (tort claim against United States "barred" unless presented to agency within two years of accrual); *see also, e.g.*, *Mayle v. Felix*, 125 S. Ct. 2562, 2572 (2005) (referring to "statute of limitations bar"); *Gonzalez v. Crosby*, 125 S. Ct. 2641, 2648 n.4 (2005) (same); *Franconia Assocs. v. United States*, 536 U.S. 129, 155 (2002) (describing limitations period in Tucker Act as a "bar"). Yet the Court has made clear that denial of a statute-of-limitations defense does not satisfy *Cohen*. *See Digital*, 511 U.S. at 873. If the judgment bar were characterized as an immunity conferring a "right not to stand trial," as Petitioners suggest (at 20-21), that well-established conclusion would have to be reconsidered; and the collateral order doctrine would quickly become unmoored from the narrow category of important and well-established immunities it currently encompasses.

The fact that section 2676 is a statutory provision rather than a common-law doctrine does not alter the outcome here. As Petitioners note (at 16), *Digital* distinguishes between rights that are "embodied in a constitutional or statutory provision," on the one hand, and rights conferred solely by private agreement, on the other. 511 U.S. at 879. *Digital* does not hold, however, that because a right is embodied in a statute, it is appropriate to characterize that right as an immunity or a right not to stand trial. Rather, addressing *Cohen*'s requirement that collateral order appeals be limited to "important" issues, *Digital* explained that *if* a statute confers an immunity, "there is little room for the judiciary to gainsay the 'importance'" of that policy. *Id.* at 879. Thus, if Petitioners could show that the statute conferred an immunity, the burden of demonstrating importance would be minimal. But they must first demonstrate that the statute confers that "rare form of protection." *Id.*

Notably, neither Congress nor the Court has ever characterized the judgment bar as an "immunity," let alone the sort of important immunity from suit necessary to invoke the collateral order doctrine. In contrast, Congress, in findings incorporated into its 1988 amendment to the FTCA, has expressly described the section 2679(b) exclusive remedy provision, which (with two exceptions) precludes suits against employees for torts committed in the scope of their employment, as providing an "immunity" for federal employees. *See* Westfall Act, Pub. L. No. 100-694, § 2(b) ("Findings"). Likewise, this Court has characterized section 2679(b) as an "immunity" provision. *See Gutierrez de Martinez*, 515 U.S. at 426. Petitioners' citations (at 24) to circuit court cases holding that denials of "Westfall Act immunity" are immediately appealable are, accordingly, inapposite.

Petitioners cite *Nixon v. Fitzgerald*, 457 U.S. 731, 752 n.32 (1982), for the proposition that "'[a]mong the most persuasive reasons supporting official immunity' is the fact that 'to submit [government] officials . . . to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute." Pet. 16 (alterations in original); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (citing similar interests to support immediate appeal of trial court order rejecting qualified immunity defense). That quotation may well be pertinent to the section 2679(b) exclusive remedy provision, in both effect and purpose, because that provision precludes most damages suits against federal employees. The quotation does not, however, apply to the judgment bar, which provides employees no protection unless a prior FTCA action has reached judgment. And although Petitioners are correct that the FTCA was intended, in part, to shift the burden of litigation from federal employees to the Government, that objective was met initially through the waiver

of sovereign immunity accomplished through section 1346(b) and, years later and to a greater extent, through the exclusive remedy provision (section 2679(b)), but not through the judgment bar. In fact, from 1946 until 1988, when Congress enacted the exclusive remedy provision, federal employees remained amenable to suit. *See Westfall*, 484 U.S. at 296-97. Petitioners may counter that section 2676 "immunity" does not attach until the plaintiff obtains a judgment in an FTCA case. That argument, however, does not describe the workings of an immunity, as that term has previously been understood; it describes the workings of res judicata.

Petitioners invoke *Abney v. United States*, which held that double jeopardy claims are immediately appealable. 431 U.S. 651, 662 (1977). *Abney*, however, does not support the right to an immediate appeal here. That decision "is based on the special considerations permeating claims of" double jeopardy]. *Id.* at 663. The purpose of the Double Jeopardy Clause, one "that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a state of anxiety and insecurity, as well as enhancing the possibility that even the innocent may be found guilty." *Id.* at 661-62 (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)). Section 2676, by contrast, is not tied to any such historical interest.

To be sure, double jeopardy and section 2676 are similar in that—unlike immunities, which preclude suit in the first instance—both apply only after the termination of a prior court proceeding. And like section 2676, the Double Jeopardy Clause serves, in part, the same sort of interests as the doctrines of res judicata and collateral estoppel. *See Crist v. Bretz*, 437 U.S. 28, 33 (1978). These similarities, however, also show that

the collateral order doctrine does not apply. As *Abney* explained, these sorts of preclusion principles—unlike the interests in protecting an individual from facing the "ordeal" of a criminal trial—"can be fully vindicated on appeal following final judgment." *Abney*, 431 U.S. at 660 (discussing interests in protecting individual against being twice convicted or twice punished for same crime). Accordingly, *Abney* confirms that res judicata interests, such as those at issue here, do not afford the basis for an immediate appeal.

Finally, Petitioners' argument in favor of immediate appellate review runs counter to the holding in *Swint*. There, a city and various county officials were sued under 42 U.S.C. § 1983, for damages arising from a series of raids on the plaintiffs' nightclub. The city moved to dismiss, arguing that, under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), it could not be held liable on a respondeat superior theory under section 1983. *Swint*, 514 U.S. at 39. The district court denied the motion, and the city appealed. Notwithstanding the holding in *Monell*—"a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents," 436 U.S. at 694—the Court rejected the characterization that *Monell* set forth an "immunity from suit," and therefore rejected the argument for appellate jurisdiction under *Cohen*. The Court explained that the city's argument was a "mere defense to liability" that could be effectively reviewed on appeal from final judgment, 514 U.S. at 43, and reiterated the principle that not every right that might be described as a "right not to stand trial" in fact qualifies as such. *Id.*

As in *Swint*, Petitioners' plea to transform their alleged defense into an immunity should be rejected. The Court should vacate the decision below on the ground that the court of appeals lacked subject matter jurisdiction under 28 U.S.C. § 1291.

III. The Dismissal Of A Case On The Ground That The Court Lacks Subject Matter Jurisdiction Because The FTCA Does Not Apply To The Claim Alleged Does Not Bar A Subsequent *Bivens* Claim.

If the Court affirms the Second Circuit's jurisdictional ruling, it should also affirm as to the scope of the FTCA's judgment bar. Section 2676 bars a plaintiff from bringing a claim against a federal employee only where that plaintiff has obtained a "judgment" in "an action under section 1346(b)." This provision does not bar the instant case for two related reasons. First, the decision in Hallock's first case did not resolve the merits of the underlying tort claim, but was based on the lack of subject matter jurisdiction. Thus, its only res judicata effect is on the issue of subject matter jurisdiction. Because the judgment bar is best construed in accordance with res judicata principles, the bar does not apply here. Second, the prior case was dismissed because section 1346(b) did not apply to Hallock's claims. For this reason, the case was not "an action under section 1346(b)."

A. The Term "Judgment" In Section 2676 Means A Decision On The Substantive Merits Of The Tort Claim.

The FTCA "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Feres*, 340 U.S. at 139. Reading the judgment bar to embody traditional principles of res judicata, and thus reading "judgment" in section 2676 to include only substantive decisions on the merits of FTCA claims, is consistent with the structure and purpose of the FTCA as a whole and avoids the inequitable consequences of broader interpretations of the term.

1. Looking to one meaning of the term "judgment," Petitioners advocate a broad reading of section 2676 under which any final order in any case alleged to fall under the FTCA bars a subsequent action against the employee involved in the underlying act. The term "judgment," however, has many definitions, and its meaning varies with context.

For example, Federal Rule of Civil Procedure 54(a) defines "judgment" to mean "a decree and any order from which an appeal lies." Although the reading advocated by Petitioners is consistent with Rule 54's definition, Rule 54(a) specifies that its definition applies only "as used in these rules." Moreover, even the Rule 54 definition plainly does not include every judgment under the Federal Rules, such as a partial summary "judgment" under Rule 56 or a declaratory "judgment" in a case in which the plaintiff also seeks an injunction, the form of which has not yet been approved by the court. *See also Catlin*, 324 U.S. at 231, 236 (district court judgment of condemnation not immediately appealable where case not disposed of in its entirety).

In contrast, as used in Federal Rule of Civil Procedure 68, "judgment" means "either the substantive relief ordered (whether legal or equitable), or that plus attorneys' fees." *Hennessy v. Daniels Law Office*, 270 F.3d 551, 553 (8th Cir. 2001); *Nordby v. Anchor Hocking Packaging Co.*, 199 F.3d 390, 392 (7th Cir. 1999). Accordingly, when comparing a Rule 68 "offer of judgment" to the "judgment finally obtained" in the case, courts have noted the ambiguity of the term "judgment" in the context of Rule 68. *See Hennessy*, 270 F.3d at 553; *Nordby*, 199 F.3d at 392; *see also Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1141-42 (9th Cir. 2001) (recognizing ambiguous meaning of "judgment" in Immigration and Naturalization Act).

Federal Rule of Civil Procedure 58 requires that "[e]very judgment . . . must be set forth on a separate document." That separate document is commonly referred to as the "judgment." *See* Fed. R. Civ. P., Form 32. This use of "judgment" is much narrower than the definition in Rule 54, which includes various collateral orders and orders with respect to injunctions, *see* 28 U.S.C. § 1292(a)(1), that do not end the litigation. *See* Rule 54(a) ("any order from which an appeal lies"). In addition, in discussing what constitutes a judgment in the context of a prior version of Rule 58, this Court equated "judgment" with a court's "final act" in a case. *See United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 232-35 (1958). Under that definition, a ruling on the merits would not constitute a "judgment" if additional matters were still pending—for example, entitlement to attorney fees where the court has granted summary judgment on the merits of the cause of action. *Cf. White v. New Hampshire Dep't of Empl. Sec.*, 455 U.S. 445, 452 (1982) (reversing court of appeals' holding that motion for attorney fees constitutes motion to alter or amend judgment); Rule 54(d)(2) (motion for attorney fees must be filed no later than 14 days "after entry of judgment").

Further demonstrating that "judgment" has no unitary meaning, in 2002, the Advisory Committee revising the Federal Rules of Civil Procedure noted the "horridly confused problems" that resulted from courts' varied understandings of what constitutes a "judgment" for purposes of determining whether Rule 58's separate document requirement has been satisfied. *See* Fed. R. Civ. P. 58 advisory committee's note (2002).

Thus, "judgment" may mean, among other things, the final decision in a case (the meaning suggested by Petitioners), or the substantive relief ordered, or a decision on the merits of a claim, or an appealable order, or a formal document ending a case. *See also Sullivan v. Finkelstein*, 496 U.S. 617, 625 (1990)

(under Social Security Act, district court remand order pursuant to fourth sentence of 42 U.S.C. § 405(g) is "judgment," but remand order under sixth sentence is not). Because the meaning depends on context, one must look to the structure and purpose of the FTCA to guide construction of the term "judgment" in section 2676. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 (1991) ("[A] statute is to be read as whole, since the meaning of statutory language, plain or not, depends on context.") (citation omitted); *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) ("[S]tatutory language must always be read in its proper context."); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("Although the State's hypertechnical reading of the nondiscrimination clause is not inconsistent with the language of that provision examined in isolation, statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

2. Under the "normal rule of statutory construction," "identical words used in different parts of the same act are intended to have the same meaning." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (quoting *Department of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)). "That principle follows from [the Court's] duty to construe statutes, not isolated provisions." *Id.* at 568.

In the FTCA, the word "judgment" appears several times. Putting aside its use in section 2676, in each instance in which the term appears in the FTCA, it clearly refers to a money judgment for the plaintiff. *See* 28 U.S.C. § 2672 (any award or settlement to be paid in a manner similar to "judgments" and compromises in like causes, and funds available for payment of such "judgments" and compromises to be made available for payment of FTCA awards and settlements); § 2674 (United States not liable for interest prior

to judgment); § 2678 (attorney fees not to exceed 25% of judgment rendered pursuant to § 1346(b)). This consistent use of the term indicates that the judgment bar of section 2676 refers to a judgment on the substantive merits of the underlying tort claim, of which a money judgment for the plaintiff is one type.

Likewise, section 2672, addressing the administrative settlement of claims, requires a far narrower reading of section 2676 than Petitioners advocate here. Again, section 2672 provides that acceptance of an administrative settlement constitutes "a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter." This language in many ways mirrors the language of the judgment bar. *See supra* p. 2. Furthermore, during the hearings on the bill later enacted as the FTCA, the only example provided of the operation of the judgment bar bundled together sections 2672 and 2676, and explained that these provisions would come into play where "the claimant has *obtained satisfaction of his claim* from the Government, either by a judgment or by an administrative award." Hearings, *supra*, at 9 (emphasis added). The "complete release" of section 2672 applies only in instances where the claimant has accepted a settlement at the administrative stage, thereby substantively resolving the matter. In light of the parallelism—of both language and purpose—between section 2672 and section 2676, and the unitary treatment of the two sections in the legislative history, it is evident that the judgment bar, too, was aimed at cases in which the plaintiff has obtained a judgment that resolves the substantive merits of the claim.

The understanding that the judgment bar and the administrative settlement provision serve similar purposes and that the judgment bar applies only where the substantive merits of the underlying tort claim have been resolved is reflected in

this Court's earliest statement with respect to the bar. In *United States v. Gilman*, 347 U.S. 507 (1954), the Court explained:

> The Tort Claims Act does not touch the liability of the employees except in one respect: by 28 U.S.C. § 2676, it makes the *judgment against the United States* "a complete bar" to any action by the claimant against the employee. And see § 2672.

Id. at 509 (emphasis added); *see also Benbow v. Wolf*, 217 F.2d 203, 205 n.4 (9th Cir. 1954) ("The Congress has the apparent intention that the individual be not pursued if the United States be liable."). Early commentators construed the judgment bar similarly. *See* Note, *Government Recovery of Indemnity from Negligent Employees: A New Federal Policy*, 63 Yale L.J. 570, 575 n.30 (1954) ("palpably unfair" to construe judgment bar to apply to all judgments, such as "where judgment is rendered for the Government on the grounds that the employee acted outside the scope of his employment"); Parker, *The King Does No Wrong—Liability for Misadministration*, 5 Vand. L. Rev. 167, 176 (1952) (judgment bar "obviously" does not apply where first action was dismissed because the employee had not acted within the scope of his employment); *see also* Street, *supra*, 47 Mich. L. Rev. at 358; Note, *supra*, 56 Yale L.J. at 559.

The purposes of the FTCA in general and the judgment bar in particular also support reading the term "judgment" to mean a decision on the merits. "The basic purpose of the legislation is to waive a part of the governmental immunity to suit in tort" so as to provide a remedy for people injured by the tortious conduct of government employees acting in the scope of their employment. H.R. Rep. No. 79-1287 at 1, 2 (1945); *see* Hearings, *supra*, at 25 (right to sue employee not sufficient because employee often "not financially capable of meeting a sizable judgment" and because "Government should in all

conscience bear the responsibility" for such torts). The drafters were also concerned about avoiding duplicative recoveries and easing the burden on the Government of defending duplicative lawsuits, given the Government's practice of defending suits brought against employees for conduct within the scope of their employment. *See* Hearings, *supra*, at 9 ("If the Government has satisfied a claim . . . that should, in our judgment, be the end of it. . . . [The claimant] should not be able to turn around and sue the [government employee]."); *id.* at 24-26; *see also* Baer, *Suing Uncle Sam in Tort: A Review of the Federal Tort Claims Act and Reported Decisions to Date*, 26 N.C. L. Rev. 119, 126 (1948) ("Such a provision is, of course, in accord with the common law rule that a claimant can have but one satisfaction for one wrong. Presumably, the claimant will have been made whole by virtue of the judgment he obtained against the government and hence should have no claim against the employee.") (footnote omitted). These objectives were achieved, in part, through section 2676, by extending the res judicata effect of a judgment on an FTCA claim to federal employees. *See* discussion *supra* pp. 13-16. Given the confluence of language and goals between the judgment bar provision and the res judicata doctrine, the best reading of "judgment" in section 2676 is "judgment on the substantive merits of the tort claim."

3. Not only does a dismissal based on a section 2680 exception not "actually 'pass[] directly on the substance of [the tort] claim before the court,'" but such a dismissal is for lack of subject matter jurisdiction—the classic example of a decision that is *not* on the merits and to which res judicata does *not* apply. *Semtek Int'l Corp. v. Lockheed Martin Corp.*, 531 U.S. 497, 501-02 (2001) (quoting Restatement (Second) of Judgments § 19 cmt.a); *see also* Fed. R. Civ. P. 41(b) (dismissal for lack of jurisdiction not an adjudication on merits). In this

situation, section 2676 does not bar an action against the employee.

Petitioners argue that the distinction between dismissals for lack of subject matter jurisdiction and dismissals on the merits is blurred in a case dismissed on the ground that the claim falls within a section 2680 exception. According to Petitioners, the section 2680 exceptions are "substantive," and thus a dismissal based on section 2680 has a substantive quality. But the key inquiry is not whether the exceptions have "substantive" content, but their role in the FTCA. The very first line of section 2680 makes their role clear: "The provisions of this chapter and section 1346(b) shall not apply to—." That is, the exceptions' function is to limit the scope of the jurisdictional provision, section 1346(b). *See* Hearings, *supra*, at 28 (describing § 2680 claims as "exemptions" and "exceptions" from the bill, in contrast to torts "within the scope of the bill"). As this Court has repeatedly explained: "Sovereign immunity is jurisdictional in nature. . . . [T]he 'terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *FDIC v. Meyer*, 510 U.S. at 475 (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); *see also United States v. Mitchell*, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.").

More generally, Petitioners' concern that the structure of the FTCA results in a great many dismissals for lack of subject matter jurisdiction, which restricts the effect of the judgment bar, is overstated. In most cases, regardless of the scope of the judgment bar, the employee will be protected by the exclusive remedy provision, section 2679(b). In any event, Petitioners' concern is a matter to be taken up with Congress, not this Court. Congress chose to limit the waiver of sovereign immunity embodied in section 1346(b) through both the

elements of that provision and through the list of claims to which the waiver "shall not apply." It cannot be disputed that such claims, including those in Hallock's first case, are not within the power of a court to adjudicate. The United States has not consented to be sued for such claims, and sovereign immunity still attaches. *See Gutierrez de Martinez*, 515 U.S. at 427 (where case involves exception to FTCA, "the United States retains immunity from suit"). Therefore, the courts lack jurisdiction over those claims. A dismissal on that basis does not touch the merits of the tort claim under state law, has no res judicata effect (again, aside from the question of jurisdiction), and does not trigger the judgment bar.

Petitioners (at 42 n.9) contend that a dismissal for failure to satisfy the substantive elements of a state-law cause of action would surely trigger the judgment bar, and yet dismissal on that ground could be considered a dismissal for lack of jurisdiction under section 1346(b) because that section provides for federal court jurisdiction in circumstances where, among other things, a private person "would be liable to the claimant in accordance with the law of the state where the [tortious] act or omission occurred." Many statutes, however, frame jurisdiction in terms of the violation alleged or remedy available. Accepting Petitioners' construct would transform dismissals based on failure to prove the substantive elements of a claim under a broad range of statutes into dismissals for lack of subject-matter jurisdiction. *See, e.g.*, 5 U.S.C. § 552(a)(4)(B) (under Freedom of Information Act, district court "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld"); 21 U.S.C. § 332 (providing for "jurisdiction, for cause shown to restrain violations of" Food, Drug, and Cosmetic Act); 30 U.S.C. § 818(b) ("[T]he court shall have jurisdiction [under Federal Mine Safety and Health Act] to provide such relief as may be appropriate.").

That a jurisdictional provision is stated with reference to a particular violation does not render proof of that violation necessary for subject-matter jurisdiction. For example, in a case brought against a federal agency under the Freedom of Information Act, the plaintiff's failure to prove that the agency improperly withheld the particular records at issue does not produce a failure of subject-matter jurisdiction, in the sense that the term is properly used. As the Court has explained, the term "jurisdictional" should be reserved to describe "classes of cases" that a court has authority to adjudicate. *Scarborough v. Principi*, 541 U.S. 401, 414 (2004). Section 2680, which lists categories, or "classes," of cases excluded from the waiver of sovereign immunity, fits this description to a T. By contrast, a court handling a case to which section 1346(b) applies plainly has the authority to adjudicate whether a federal agency is liable under state-law principles, and its decision that the agency is not liable does not mean that it never had authority to decide the case. Rather, it has exercised that authority and decided the merits.

Moreover, Petitioners' discussion of the consequence of a dismissal based on lack of liability under state law fails to address the key inquiry: the preclusive effect of the decision in the case. A judgment based on a determination that the plaintiff was *not* the victim of a state-law tort is a determination on the merits, just as surely as a decision that the plaintiff *was* the victim of a tort. And a judgment based on a determination with respect to liability under state law is precisely the type of judgment that carries full res judicata effect because the determination does not address *whether* the court has the power to adjudicate the case, but in fact *is* an adjudication on the merits of the case. Indeed, whether or not denoted a decision on "jurisdiction," a dismissal on state-law grounds would have

the same preclusive effect on the plaintiff because the issue *actually decided* would be that the plaintiff has no tort claim.[8]

In contrast, a determination based on a section 2680 exemption does not touch on the merits question in the case: whether the government employees committed a tort under the applicable state law. It is a decision with respect to jurisdiction: whether the case falls within the class of cases for which Congress waived sovereign immunity. The decision has no res judicata effect (other than on the issue of jurisdiction). Therefore, it does not trigger the judgment bar.

4. Petitioners (at 42) assert that the FTCA's limitations period circumscribes the waiver of sovereign immunity and that a dismissal on statute of limitations grounds is a dismissal for lack of jurisdiction. They then assume that a judgment based on expiration of the statute of limitations triggers the judgment bar and conclude that a judgment based on section 2680 must do so as well. Petitioners' reasoning and conclusion are flawed.

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[8]Petitioners (at 41) quote from a footnote in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), which cites *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997), for the point that "a 'jurisdictional' limitation [that] adheres to the cause of action" by "prescrib[ing] a limitation that any court entertaining the cause of action [is] bound to apply" is "essentially substantive." However, *Hughes* discussed the substantive nature of the rights created by the "jurisdictional statute" only to explain why the presumption against retroactivity applied, and the opinion nowhere implies that the dismissal for subject matter jurisdiction in that case had different res judicata consequences from a dismissal on that ground in other cases.

In *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979), the Court referred to the statute of limitations provision in the FTCA as "a condition of [the] waiver" of sovereign immunity. From this statement, some courts have concluded—and Petitioners assume—that compliance with the FTCA's statute of limitations is jurisdictional and that dismissal on that ground is a dismissal for lack of subject matter jurisdiction. *See Johnson v. Smithsonian Inst.*, 189 F.3d 180 (2d Cir. 1999). However, the FTCA's statute of limitations is not included in the jurisdictional provision, section 1346(b), or even in chapter 171 of Title 28, to which section 1346(b) is "subject." *See* 28 U.S.C. § 2401(b) (provision of Ch. 161 setting forth statute of limitations for tort claims against the United States). Furthermore, the Court has expressly warned against "[c]lassifying time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction.'" *Scarborough*, 541 U.S. at 414 (citation omitted); *see also id.* (term "jurisdictional" is properly reserved to describe "classes of cases" over which a court has authority); *cf. Zipes v. Trans World Airlines*, 455 U.S. 385, 393, 394, 395 (1982) (timely filing of administrative claim is not "jurisdictional" prerequisite to Title VII suit, where filing deadline is comparable to statute of limitations). Accordingly, a statute-of-limitations defense to an FTCA claim is not properly deemed "jurisdictional." In contrast, section 2680, listing exceptions to section 1346(b), indisputably lists categories of cases that fall outside the courts' adjudicatory authority and, therefore, sets forth jurisdictional limits.

Terminology aside, for res judicata purposes, "the traditional rule is that expiration of the applicable statute of limitations merely bars the remedy and does not extinguish the right, so that dismissal on that ground does not have [res judicata] effect in other jurisdictions with longer, unexpired limitations periods." *Semtek*, 531 U.S. at 504; *accord* 18A Wright, Miller & Cooper, *supra*, § 4441, at 214 n.1 (citing

cases). In this way, a dismissal on statute-of-limitations grounds has a similar effect for res judicata purposes as a dismissal for lack of subject matter jurisdiction.[9]

Moreover, the Court has made clear that "limitations principles should generally apply to the Government 'in the same way that' they apply to private parties." *Franconia Assocs.*, 536 U.S. at 145 (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)). For example, in *Irwin*, although the Court recognized that the statute of limitations was an aspect of the waiver of sovereign immunity, it applied the same estoppel principles to a case against the United States as would apply in a case against a private party. 498 U.S. at 95. Thus, in an FTCA suit, a statute-of-limitations dismissal extinguishes the FTCA remedy. However, it does not address the underlying merits of the state-law tort claim and has no preclusive effect beyond the limitations issue. In line with

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[9]As the Court has observed, "the meaning of the term 'judgment on the merits' 'has gradually undergone change,' and it has come to be applied to some judgments . . . that do *not* pass upon the substantive merits of a claim and hence do *not* (in many jurisdictions) entail claim preclusive effect." *Semtek*, 531 U.S. at 502 (citation omitted). One example of this expanded use of "judgment on the merits" is use of the phrase to describe a dismissal on statute-of-limitations grounds. *Id.* at 502-03 (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995)). Thus, notwithstanding the "possibly misleading connotations," *id.* at 503 (citing Restatement (Second) of Judgments § 19 cmt. a, at 161), references in some cases to statutes-of-limitations dismissals as "judgments on the merits" should not be taken to mean that such dismissals have a res judicata effect beyond the statute-of-limitations question. *See id.* at 504.

the res judicata principles that underlie the judgment bar, section 2676 should not apply to dismissals on statute-of-limitations grounds, just as it does not apply to dismissals based on section 2680.

5. Congress's decision to limit the waiver of sovereign immunity by framing much of the FTCA in terms of jurisdiction is consistent with the purposes of the FTCA and the judgment bar. Congress's objective was not to deprive injured individuals of all means of recovery. Congress wanted to prevent double recoveries, to shift the burden from employees to the United States in certain circumstances, and to avoid duplicative litigation. *See supra* pp. 13-15, 31-32. Hallock's reading of the judgment bar is consistent with those objectives. Petitioners' reading, however, would transform the judgment bar from a tool for fairness and efficiency into a punitive provision to trap unsophisticated plaintiffs or those who—at the start of litigation, before discovery—have a good faith (but incorrect) belief that a federal employee was acting within the scope of employment or that a claim does not fall within an exception to the waiver of sovereign immunity.

For example, suppose that a government employee is involved in a car accident and the driver of the other vehicle, believing the employee to have been on government business at the time of the accident, files suit against the Government alleging an FTCA claim. The Government then successfully moves to dismiss for lack of subject matter jurisdiction because the driver, although a government employee, was not acting within the scope of his employment, but was on a personal errand at the time of the accident. Under Petitioners' theory, the plaintiff would be barred by the "judgment" in the first case from then bringing a tort action against the employee. Such an outcome would not serve the FTCA's goals. *See Gutierrez de Martinez*, 515 U.S. at 426 (Congress "wanted the employee's personal immunity to turn on that [scope-of-employment]

question alone") (citing legislative history of Westfall Act). Rather, that result would undermine the drafters' objective of providing a more certain avenue for "giving claimants a day in court in respect of common-law torts committed by Government employees in the scope of their employment." *See* Hearings, *supra*, at 24.[10]

Or suppose a plaintiff sues a federal employee for a state-law tort, and the Government substitutes in as defendant pursuant to section 2679(d)(1). Because the plaintiff has not previously filed an administrative claim, the case is dismissed for failure to exhaust administrative remedies. That dismissal would not have a res judicata effect as to any issue other than exhaustion at that time, 18A Wright, Miller & Cooper, *supra*, § 4436, at 172; and assuming that the FTCA's statute of limitations had not expired before the case against the employee was filed, the dismissal would not bar the plaintiff from filing an administrative claim against the Government and then suing again if the claim were not resolved. 28 U.S.C. § 2679(d)(5). Yet under Petitioners' reading, that judgment would bar a *Bivens* action against the employee. *Cf. Freeze v. United States*, 343 F. Supp. 2d 477 (M.D.N.C. 2004) (plaintiff alleged FTCA claim against Government and, in same complaint, alleged *Bivens* claim against federal employee; court

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[10]Although a plaintiff must first file an administrative claim with the Government, doing so will not necessarily tell him whether the Government believes that the claim falls outside the scope of the FTCA. As happened in Hallock's case, the Government does not always respond to an administrative FTCA claim within six months. If the claim is not resolved within six months, the plaintiff may consider the claim denied and file suit. 28 U.S.C. § 2675(a); *see, e.g, Gutierrez de Martinez*, 515 U.S. at 421 n.1.

dismissed FTCA claim for failure to exhaust and then dismissed *Bivens* claim on basis of judgment bar). This outcome, too, is inconsistent with the structure and purpose of the FTCA as a whole, as well as with the legislative intent behind the judgment bar.

B. The Prior Action Was Not "Under Section 1346(b)."

The FTCA's judgment bar, section 2676, applies only after a judgment has been issued in "an action under section 1346(b)." The bar does not extend to an action "alleged to fall under" section 1346(b) or to an action in which the plaintiff "tried to invoke jurisdiction under" section 1346(b). Hallock's first suit was dismissed precisely because it was not an action under section 1346(b). The judgment in that case therefore could not trigger section 2676. For this reason as well, if the Court concludes that the court of appeals had jurisdiction, its decision should be affirmed.

1. To be sure, the complaint in Hallock's first case alleged section 1346(b) as the basis for jurisdiction. However, in holding that the claims alleged fell outside of section 1346(b), the district court rejected Hallock's jurisdictional allegation. Specifically, because the claims alleged arose "in respect of . . . the detention of goods," they fell under an exception to the waiver of sovereign immunity stated in section 2680(c), and so, by definition, section 1346(b) did "not apply" to them. 28 U.S.C. § 2680.

As the Court has explained: "[Section] 1346(b) describes the scope of jurisdiction by reference to claims for which the United States has waived its immunity and rendered itself liable." *FDIC v. Meyer*, 510 U.S. at 479. Without dispute, the United States has not waived its immunity and rendered itself liable for claims arising from the detention of goods. 28 U.S.C. § 2680(c); *see Kosak v. United States*, 465

U.S. 848 (1984). Indeed, that conclusion was the basis for the holding in Hallock's first case. Thus, to accept the argument that the judgment bar applies here requires one to accept the contradiction that a claim can simultaneously be a claim to which section 1346(b) "shall not apply" and a claim "under" section 1346(b). But an action *outside* the scope of section 1346(b) cannot also fall *under* section 1346(b).

Petitioners' counsel seek to have it both ways. On the one hand, they successfully argued in the first case that the jurisdictional allegation in Hallock's complaint was incorrect and that the action could not be maintained under section 1346(b). On the other hand, they argue here that the jurisdictional allegation must be respected and accepted on its face to show that the first case was an action under section 1346(b). But the legal allegation of section 1346(b) jurisdiction has already been adjudicated, and the Government won: The court held that section 1346(b) did "not apply" to Hallock's claims. Nothing in the language of the judgment bar or the structure or purposes of the FTCA requires the Court to look with tunnel vision at the first complaint's jurisdictional allegation and treat it as correct, when the matter has already been litigated to a final and contrary conclusion. *See Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co.*, 292 U.S. 386, 391 (1934) (allegation in complaint that case fell under Judicial Code § 266 insufficient to allow plaintiff to avail itself of appeal provisions of that section, where § 266 did not in fact apply); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003) (complaint alleged under state law "is in reality based on federal law" when a federal statute completely preempts the state-law cause of action).

2. In *FDIC v. Meyer*, the Court considered the scope of the FTCA provision stating that, for those agencies with authority to sue and be sued in their own names, the FTCA is nonetheless the exclusive remedy for claims "cognizable under

section 1346(b)." 28 U.S.C. § 2679(a). Looking to the language of section 1346(b), the Court identified six elements of a claim "cognizable" or "actionable" under that section. 510 U.S. at 477. Here, Petitioners argue that Hallock's first case was "under section 1346(b)" because each of the six elements identified in *Meyer* was satisfied in the prior case. However, in *Meyer*, the claim at issue did *not* satisfy each of the elements. Consequently, the Court had no occasion to consider whether a claim "cognizable under" section 1346(b) must meet any additional requirements. In particular, the Court did not discuss the exceptions to section 1346(b) listed in section 2680.

Nonetheless, as Petitioners point out, several courts have construed section 2679(a) to preclude suits against an agency, even if a claim falls within a section 2680 exception and therefore cannot be maintained under the FTCA. *See, e.g., Audio Odyssey, Ltd. v. United States*, 255 F.3d 512, 522 (8th Cir. 2001); *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1142 (10th Cir. 1999). However, each of these decisions has relied on the Court's statement that Congress, through section 2679(a), limited the scope of sue-and-be-sued waivers so as to "place tort suits of 'suable' agencies . . . upon precisely the same footing as torts of 'nonsuable' agencies." *FDIC v. Meyer*, 510 U.S. at 476 (alteration in original) (quoting *Loeffler v. Frank*, 486 U.S. 549, 562 (1988) (quoting H.R. Rep. No. 79-1287 at 6 (1945))). "Sue-and-be-sued" agencies cannot be "on the same footing" as other agencies if tort suits against them are not precluded where the matter falls under a section 2680 exception. Thus, the purpose of section 2679(a) strongly favors the broad reading adopted in the cases on which Petitioners rely.

In contrast, the purpose of section 2676 does not favor a broad reading. In section 2676, construing the phrase "under section 1346(b)" to include only suits to which section 1346(b) in fact "applies"—that is, not to encompass suits that fall within

an exception—does not undermine the purpose of the judgment bar. As the district court observed, in circumstances where an FTCA claim has been promptly dismissed for lack of subject matter jurisdiction (as in Hallock's prior case or in cases where a *Bivens* claim is alleged along with an FTCA claim), reading the judgment bar to require dismissal of a *Bivens* claim neither prevents duplicative litigation nor is necessary to prevent dual recovery. Pet. App. 24a.

The different language used in section 2676—"under" as opposed to "cognizable under"—further supports the conclusion that the judgment bar does not apply where a prior case was dismissed because the claim fell within an exception to section 1346(b). As this Court has noted, "[t]he word 'under' has many dictionary definitions and must draw its meaning from its context." *Ardestani v. INS*, 502 U.S. 129, 135 (1991) (construing phrase "under section 554" in Equal Access to Justice Act). As used in section 2676, the natural reading is that "under" means "subject to" or "governed by." *See id.* A suit dismissed because the claims fall within an exception to section 1346(a) cannot logically be said to be "subject to" or "governed by" that section.

3. The notion that a claim is governed by a statutory provision that does not apply to it requires linguistic gymnastics beyond the flexibility of the English language. Petitioners argue, however, that *United States v. Smith*, 499 U.S. 160 (1991), requires the Court to undertake such gymnastics. In that case, the Court construed section 2679(b)(1), which states:

> The remedy against the United States provided by section 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope

> of his or her employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim . . . . Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee . . . is precluded without regard to when the act or omission occurred.

The Court held that this provision applies even where the claim falls under one of the exceptions stated in section 2680. As a result, "the FTCA is the exclusive mode of recovery for the [common-law] tort of a government employee even when the FTCA itself precludes government liability." 499 U.S. at 166.

According to Petitioners (at 33-34), because the Court concluded that the phrase "the remedy . . . provided by sections 1346(b) and 2672" includes instances where the claim is precluded by section 2680, the phrase "an action under section 1346(b)" in the judgment bar includes cases improperly brought under section 1346(b) and dismissed under section 2680. This argument ignores entirely the language of the different provisions and the Court's reasoning in *Smith*. To begin with, the language of section 2679(b)(1) does not parallel the language of the judgment bar. The exclusive remedy provision provides that, subject to the two express exceptions set forth in 28 U.S.C. § 2679(b)(2), the remedy provided by sections 1346(b) and 2672 is "exclusive" for the torts described, and that "[a]ny other civil action . . . for money damages arising out of or relating to the same subject matter . . . is precluded." This broad language does not say that the remedy is exclusive for claims "under section 1346(b)." It says that, for the torts described, section 1346(b) provides the only avenue for a judicial remedy. Accordingly, as *Smith* held, whether or not that avenue is closed (as when the tort arises from an act within

a section 2680 exception), section 2679(b)(1) forecloses an action against the employee.

Moreover, Petitioners' leap—that if section 2679(b)(1) applies regardless of whether a plaintiff's claim falls under an FTCA exception, then section 2676 applies regardless of whether the prior case was dismissed because it fell under an exception—is not supported by the Court's reasoning in *Smith*.

Smith was based on two provisions of the FTCA. First, *Smith* looked to section 2679(d). That provision, enacted in 1988 as part of the Westfall Act, directs the Attorney General, when a federal employee is sued in tort, to certify that the employee was acting within the scope of his or her employment, where that is the case. Once the Government has done so, the suit proceeds as an FTCA action against the United States, "subject to the limitations and exceptions applicable to those actions." 28 U.S.C. § 2679(d)(4). This language, *Smith* explained, shows that Congress intended to require substitution of the United States even in cases where doing so would foreclose a remedy altogether because the claim against the Government would fall under a section 2680 exception. *Smith*, 499 U.S. at 166. The Court noted that the legislative history fully supports such a reading. *Id.* at 167 n.9 ("Thus, any claim against the government that is precluded by the exceptions set forth in Section 2680 . . . also is precluded against an employee in his or her estate.") (emphasis omitted) quoting legislative history). Neither section 2679(d) nor the 1988 legislative history of the exclusive remedy provision sheds any light on Congress's intent in 1946 with respect to the judgment bar.

Second, *Smith* looked to section 2679(b)(2), which provides that 2679(b)(1) does not apply to *Bivens* actions and actions under federal statutes that authorize recovery against a government employee. Because Congress created two express exceptions to the exclusive remedy provision, the Court

declined to imply a third (for claims falling within section 2680), absent evidence of a contrary congressional intent. *Smith*, 499 U.S. at 167. Again, this portion of the Court's reasoning, which focuses on other provisions of section 2679 and the legislative intent of the 1988 Westfall Act, says nothing about the proper construction of the judgment bar, which has remained unchanged since its enactment in 1946. To the extent that *Smith* helps at all to discern the scope of the bar, it supports Hallock's position by pointing to Congress's effort to preserve *Bivens* actions from the risk of preclusion by broad readings of the FTCA, such as the reading that Petitioners advocate here.

4. That Petitioners seek to bar a *Bivens* claim also supports Hallock's reading. *Bivens* held that a victim of a constitutional violation by a federal officer may bring a damages action against the officer in federal court. 403 U.S. at 397. The Court later explained that individuals who have "no [other] effective means" of redress "must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *Davis v. Passman*, 442 U.S. 228, 242 (1979). Hallock's first case established that Hallock had "no effective means" of redress other than *Bivens*—indeed, no means at all—because the only other potential avenue, an FTCA cause of action, does "not apply" to the facts at issue. *See Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) (explaining that *Bivens* claims are recognized where plaintiff "lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct"). Hallock's circumstances are precisely those for which a *Bivens* claim should be available.

The Congress that passed section 2676 in 1946 did not speak to its effect on a *Bivens* claim (a cause of action not expressly recognized by the Court until 1971). Nonetheless, statements from later years show that Congress, in amending the FTCA, has assumed that the statute does not have the harsh

impact advocated by Petitioners. For example, in 1974, Congress amended the FTCA to allow claims against the United States based on the commission of certain intentional torts by federal law enforcement officers. *See* 28 U.S.C. § 2680(h). The legislative history "made it crystal clear that Congress views the FTCA and *Bivens* as parallel, complementary causes of action." *Carlson v. Green*, 446 U.S. 14, 20 (1980) (section 2680(h) "should be viewed as a *counterpart* to the *Bivens* case and its progeny") (quoting S. Rep. No. 93-588 at 3 (1973) (emphasis added in opinion)). The notion that an FTCA claim and a *Bivens* claim are "parallel" and "counterpart[s]" cannot be reconciled with the theory that a judgment based on a finding that the FTCA does "not apply" can preclude *Bivens* liability.

Likewise, the exclusive remedy provision enacted in 1988 broadly immunized federal employees from tort liability, *see* 28 U.S.C. § 2679(b)(1), but preserved liability for constitutional violations (that is, *Bivens* claims) and in instances where an action is expressly authorized by another statute. *See id.* 2679(b)(2). Section 2679(b) limits the significance of the judgment bar, which now has practical effect only in section 2679(b)(2) cases. At the same time, section 2679(b)(2) shows that Congress did not think that the policy (embodied in the exclusive remedy provision) of precluding liability against employees applied to claims outside the FTCA. The legislative history of the original statute—explaining that section 2676 "constitutes a bar to further action upon the same *claim*"—evinces the same policy judgment. *See* Hearings, *supra*, at 27 (emphasis added).

* * * * *

The purposes of the FTCA— providing a remedy for people injured by government employees, while at the same time precluding suit against employees where the matter has

been resolved with the Government—do not support barring an action that is based on a claim that is not among those for which Congress has shifted liability to the Government. In cases such as this one, Congress has left liability to rest on the individual employee. Petitioners maintain that, because Susan Hallock and Ferncliff Associates erroneously sued the United States, alleging a claim outside the scope of the FTCA, their *Bivens* claim is barred by the principles of res judicata embodied in section 2676. Neither 2676 nor any other authority compels that harsh result.

CONCLUSION

The decision of the court of appeals should be vacated because the court lacked appellate jurisdiction. If the Court finds that the court of appeals had appellate jurisdiction, the decision of the court of appeals should be affirmed.

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No. 04-1332

In the Supreme Court of the United States

RICHARD WILL, ET AL., PETITIONERS

v.

SUSAN HALLOCK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

	Page
A. The denial of petitioners' statutory immunity from suit under Section 2767 was immediately appealable	1
1. Section 2676 is distinct from the common law doctrine of res judicata	3
2. The interests protected by Section 2676 are the same as those that have been previously recognized as warranting immediate review	6
B. Respondents' FTCA suit was "an action under section 1346(b)," and the "judgment" in that suit bars respondents' action against petitioners individually	8
1. An action that asserts the six elements in Section 1346(b) is "an action under section 1346(b)," even if the claim is ultimately barred by Section 2680	8
2. The judgment dismissing respondents' FTCA action as barred by the detention-of-goods exception was a "judgment" within the meaning of Section 2676	13
a. Respondents' argument is inconsistent with the text of Section 2676 and ignores the substantive nature of the Section 2680 exceptions	13
b. Even if Section 2676 were interpreted with reference to res judicata doctrine, dismissal under Section 2680(c) would qualify as a judgment "on the merits" to which preclusion would attach	16

TABLE OF AUTHORITIES

Cases:	Page
Abney v. *United States*, 431 U.S. 651 (1977)	7
Angel v. *Bullington*, 330 U.S. 182 (1947)	17, 20
Annapolis Urban Renewal Auth. v. *Interlink, Inc.*, 405 A.2d 313 (Md. Ct. Spec. App. 1979)	18, 20
Audio Odyssey, Ltd. v. *United States*, 255 F.3d 512 (8th Cir. 2001)	9
Beaver v. *Bridwell*, 598 F. Supp. 90 (D. Md. 1984)	18
Behrens v. *Pelletier*, 516 U.S. 299 (1996)	8
Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)	1
Bloomquist v. *Brady*, 894 F. Supp. 108 (W.D.N.Y. 1995)	18
Bolduc v. *United States*, 402 F.3d 50 (1st Cir. 2005)	15
Bullock v. *United States*, 72 F. Supp. 445 (D.N.J. 1947)	4
Cohen v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)	1
Davric Maine Corp. v. *USPS*, 238 F.3d 58 (1st Cir. 2001)	9, 10
Digital Equip. Corp. v. *Desktop Direct, Inc.*, 511 U.S. 863 (1994)	3, 6, 7, 8
Dozier v. *Ford Motor Co.*, 702 F.2d 1189 (D.C. Cir. 1983)	17, 19
El San Juan Hotel Corp., In re, 841 F.2d 6 (1st Cir. 1988)	4
FDIC v. *Meyer*, 510 U.S. 471 (1994)	9, 10, 16
Farmer v. *Perrill*, 275 F.3d 958 (10th Cir. 2001)	2
Flores v. *Edinburg Consol. Indep. Sch. Dist.*, 741 F.2d 773 (5th Cir. 1984)	18
Franklin Sav. Corp. v. *United States*, 180 F.3d 1124 (10th Cir.), cert. denied, 528 U.S. 964 (1999)	9

Cases—Continued: Page

Frigard v. *United States*, 862 F.2d 201 (9th Cir. 1988), cert. denied, 490 U.S. 1098 (1989) 18
GAF Corp. v. *United States*, 818 F.2d 901 (D.C. Cir. 1987) 19
Gasho v. *United States*, 39 F.3d 1420 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995) 12
Graff Furnace Co. v. *Scranton Coal Co.*, 266 F. 798 (3d Cir. 1920) 5
Gutierrez de Martinez v. *Lamagno*, 515 U.S. 417 (1995) 3
Harris v. *United States*, 422 F.3d 322 (6th Cir. 2005) 15
Herring v. *Texas Dep't of Corr.*, 500 S.W.2d 6 (Tex. 1973), aff'd, 513 S.W.2d 16 (Tex. 1974) 18
Kontrick v. *Ryan*, 540 U.S. 433 (2004) 17
Kutzik v. *Young*, 730 F.2d 149 (4th Cir. 1984) 18
Lauro Lines s.r.l. v. *Chasser*, 490 U.S. 495 (1989) 6
Magnus Elecs., Inc. v. *La Republica Argentina*, 830 F.2d 1396 (7th Cir. 1987) 19
Midwest Knitting Mills, Inc. v. *United States*, 741 F. Supp. 1345 (E.D. Wis. 1990), aff'd, 950 F.2d 1295 (1991) 18
Mills v. *Lincoln County*, 864 P.2d 1265 (Mont. 1993) 18
Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 2
Molzof v. *United States*, 502 U.S. 301 (1992) 16
Parklane Hosiery Co. v. *Shore*, 439 U.S. 322 (1979) 4, 5, 6
Puerto Rico Aqueduct & Sewer Auth. v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) 1, 2
Rose v. *Town of Harwich*, 778 F.2d 77 (1st Cir. 1985), cert. denied, 476 U.S. 1159 (1986) 17, 19
United States v. *Gaubert*, 499 U.S. 315 (1991) 20
United States v. *Gilman*, 347 U.S. 507 (1954) 2, 12

Cases—Continued: Page

United States v. *Smith*, 499 U.S. 160 (1991) 9
Voisin's Oyster House, Inc. v. *Guidry*, 799 F.2d 183 (5th Cir. 1986) 19
Weston Funding Corp. v. *Lafayette Towers, Inc.*, 550 F.2d 710 (2d Cir. 1977) 20
Wheeler v. *Hurdman*, 825 F.2d 257 (10th Cir.), cert. denied, 484 U.S. 986 (1987) 19
Williams v. *United States*, 50 F.3d 299 (4th Cir. 1995) 19

Constitution, statutes and rules:

U.S. Const. Amend. V:
Double Jeopardy Clause 7
Federal Tort Claims Act:
28 U.S.C. 1346 6
28 U.S.C. 1346(b) ..... *passim*
28 U.S.C. 2674 ..... 6, 14, 16
28 U.S.C. 2676 ..... *passim*
28 U.S.C. 2679(a) 8, 9, 10
28 U.S.C. 2679(b) 2, 3, 8, 9
28 U.S.C. 2679(b)(1) 9
28 U.S.C. 2679(d) 8, 9, 16
28 U.S.C. 2679(d)(4) 9, 10, 11
28 U.S.C. 2680 ..... *passim*
28 U.S.C. 2680(c) 15, 17
28 U.S.C. 2680(k) 9
Fed. R. Civ. P.:
Rule 12(b)(1) 19
Rule 56 19

Miscellaneous:

47 Am. Jur.2d *Judgments* (1995) 4
Black's Law Dictionary (4th ed. 1951) 10
H.R. Rep. No. 700, 100th Cong., 2d Sess (1988) 3
34 C.J. *Judgments* (1924) 5, 12, 17
Restatement of Judgments (1942) 5
Restatement (Second) of Judgments (1982) 5

Miscellaneous: Page

Harry Street, *Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act*, 47 Mich. L. Rev. 341 (1949) 5

REPLY BRIEF FOR THE PETITIONERS

The Federal Tort Claims Act (FTCA) provides, without limitation, that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar" to an action against a federal employee concerning the same subject matter as the FTCA suit. 28 U.S.C. 2676. Respondents do not dispute that they previously sued the United States under 28 U.S.C. 1346(b), that judgment was entered against them in that FTCA action, and that the present action, brought against the individual government employees under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), arises out of the same subject matter as respondents' prior action. Section 2676, by its terms, thus bars respondents' suit. Respondents' attempts to avoid the plain text of the statute are unavailing.

A. The Denial Of Petitioners' Statutory Immunity From Suit Under Section 2676 Was Immediately Appealable

As the court of appeals properly recognized, the statutory immunity from suit afforded federal employees by Section 2676 serves the same interests that this Court has previously recognized as warranting immediate appellate review. Respondents do not dispute that the first two requirements for immediate review under the collateral order doctrine as articulated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), are satisfied here. The district court's denial of petitioners' motion to dismiss on the basis of the judgment bar in Section 2676 "conclusively determine[d] the disputed question," and "resolve[d] an important issue completely separate from the merits of the action." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993). See Gov't Br. 18-19.

We demonstrate in our opening brief (at 19-24) that the third prong of the Cohen test is also satisfied, because the question whether Section 2676 guarantees petitioners protection against further litigation would "be *effectively*

unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct*, 506 U.S. at 144 (emphasis added). As the court of appeals in this case held, Section 2676 is properly understood as conferring a "statutory immunity from suit." Pet. App. 10a-11a; accord *Farmer* v. *Perrill*, 275 F.3d 958, 961 (10th Cir. 2001); see Gov't Br. 19-22. The judgment bar does not speak in terms of merely providing a defense against liability. Rather, Section 2676 directs that an FTCA judgment shall constitute "a *complete* bar to any *action*" against the federal employee. 28 U.S.C. 2676 (emphasis added). Thus, it is the "action" that is barred, and it is barred "complete[ly]." Appeal of an erroneous Section 2676 decision after trial and final judgment would not vindicate the "complete bar" to the burdens of litigation that the statute guarantees.

Moreover, the interests that are protected by Section 2676 are ones that have been recognized repeatedly as warranting immediate appeal. The judgment bar was enacted principally to address the "very real attack upon the morale" of public servants, who were "not in a position to stand or defend large damage suits." *United States* v. *Gilman*, 347 U.S. 507, 511-512 n.2 (1954) (quoting testimony of Assistant Attorney General Francis M. Shea). That same governmental interest in minimizing the toll on the public interest caused by the distraction and inhibition of government employees in the performance of their official duties has been recognized as sufficiently important to warrant immediate review of immunity defenses in the context of common law official immunity, see, *e.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), and statutory immunities like the provision of the FTCA itself, 28 U.S.C. 2679(b), that provides for substitution of the United States and dismissal of the action against the individual employee arising out of the same subject matter, see Gov't Br. 23-24 (citing cases).

Respondents in fact concede (Br. 22) that "if Petitioners could show that the statute conferred an immunity," any fur-

ther burden of demonstrating that the third prong of the *Cohen* test is satisfied "would be minimal." In this regard, respondents acknowledge (Br. 23) that in passing the Westfall Act, in which Section 2679(b) was enacted, Congress regarded that provision as affording federal employees "immunity," even though Section 2679(b) does not use that word. See H.R. Rep. No. 700, 100th Cong., 2d Sess. 2 (1988); *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 426 (1995) (characterizing the Westfall Act's protection as a "personal immunity"). And respondents do not dispute that both Section 2679(b) and Section 2676 serve the same purpose—avoiding the distraction and inhibition of public employees resulting from suits relating to acts within the scope of their employment—and do so in the same manner—barring a claim against the individual employee where there the plaintiff can sue (Section 2679(b)) or has sued (Section 2676) the government under Section 1346(b). Thus, Congress's view that Section 2679(b) confers an "immunity," H.R. Rep. No. 700, *supra*, at 2, strongly supports the conclusion that Section 2676 confers an immunity from suit as well.

Respondents nevertheless contend that vindication of federal employees' protection under Section 2676 must await review after trial and final judgment. Resp. Br. 19, 25. Respondents' argument depends on two related premises: first, that Section 2676 is simply a rule of "res judicata," *id.* at 20; and, second, that *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863 (1994), establishes a categorical rule that a claim in the nature of "res judicata" is not immediately appealable under the collateral order doctrine. Both of those premises are incorrect.

1. Section 2676 Is Distinct From The Common Law Doctrine Of Res Judicata

Respondents posit that Section 2676 was intended "to extend the traditional principles of res judicata to cover the government employees whose conduct underlies an FTCA

claim." Resp. Br. 9. In other words, respondents contend that Congress intended to incorporate every nuance of the common law doctrine of res judicata, with the single exception of relaxing the requirement of mutuality. See, *e.g.*, Resp. Br. 13-14. That argument does not withstand scrutiny.

As respondents note, the classic statement of the doctrine of res judicata is that "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." Resp. Br. 13 (quoting *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979)). That traditional rule embodies three principal elements: (1) the nature of the prior judgment, which must be "on the merits"; (2) the relationship of the parties to the two cases, who must be "the same parties or their privies"; and (3) the relationship between the subject matter of the two suits, which must be "based on the same cause of action." Section 2676 departs from the common law rule with respect to each of these elements.

Respondents acknowledge that Congress rejected the traditional res judicata requirement of mutuality by applying Section 2676's bar to suits against "the government employees whose conduct underlies an FTCA claim." Resp. Br. 9. Thus, despite the fact that "at the time the FTCA was enacted, the federal courts required mutuality," *id.* at 10, Congress established that federal employees could claim the benefit of a judgment in an action against the United States under the FTCA.[1]

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[1] Moreover, even now, nonmutual claim preclusion ordinarily applies only "where the party asserting res judicata should have been joined in the first action and the party against whom it is being asserted cannot show any good reason why he was not joined." 47 Am. Jur. 2d *Judgments* § 653 (1995). See, *e.g.*, *In re El San Juan Hotel Corp.*, 841 F.2d 6, 10 (1st Cir. 1988). Yet Section 2676 applies even if the claim against the federal employee could not have been joined with the original FTCA action, such as, before supplemental party jurisdiction existed, because of the absence of diversity. See, *e.g.*, *Bullock* v. *United States*, 72 F. Supp. 445 (D.N.J.

Similarly, Congress did not limit the scope of the bar to suits "based on the same cause of action." *Parklane Hosiery*, 439 U.S. at 326 n.5. See Restatement of Judgments § 63 (1942) (judgment bars subsequent "action on the same cause of action"). Rather, Section 2676 specifies that it bars "any action by the claimant[] by reason of the same subject matter." 28 U.S.C. 2676. By contrast, according to the traditional rule, "a judgment in a former suit, although between the same parties and relating to the same subject matter, is not a bar to a subsequent action, when the cause of action is not the same." 34 C.J. *Judgments* § 1231, at 813 (1924); see, *e.g.*, *Graff Furnace Co.* v. *Scranton Coal Co.*, 266 F. 798, 802-803 (3d Cir. 1920) (a cause of action for removal of vertical support to surface land is distinct from a cause of action regarding the right to lateral support, and a prior judgment on the former did not preclude a second action on the latter). Indeed, a law review article cited by respondents recognizes that, in addition to "extend[ing]" protection beyond traditional res judicata rules "by providing that actions against the United States bar actions against the employee," Section 2676's "loose expression 'by reason of the same subject matter' * * * extends the common law rules by barring further suits even though based on a different cause of action." Harry Street, *Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act*, 47 Mich. L. Rev. 341, 358 (1949).[2]

1947) (dismissing for lack of diversity jurisdiction a claim against a private defendant that had been joined in an FTCA action).

[2] When the FTCA was enacted, the common law of res judicata was beginning to move away from formalistic distinctions based on "cause of action," although the Restatement of Judgments (1942) continued to use that phrase. See *id.* § 45(a) and (b); *id.* § 63. The Second Restatement rejects the term "cause of action" in favor of "claim," which it defines by reference to "the transaction, or series of transactions, out of which the action arose." Restatement (Second) of Judgments § 24(1) (1982).

Finally, whereas the traditional rule of res judicata expressly applies only to a prior judgment "on the merits," *Parklane Hosiery*, 439 U.S. at 326 n.5, the FTCA judgment bar does not incorporate that limitation. Rather, the text of Section 2676 establishes its own test—whether there has been a "judgment in an action under section 1346(b)"—without regard to whether the judgment was "on the merits."[3]

Thus, respondents are wrong to equate the statutory protection afforded federal employees under Section 2676 and the distinct and more limited common law doctrine of res judicata.

2. The Interests Protected By Section 2676 Are The Same As Those That Have Been Previously Recognized As Warranting Immediate Review

Respondents rely heavily on the Court's decision in *Digital Equipment*. There, the Court acknowledged that the defendant's rights under a private settlement agreement, like a defendant's rights under the doctrine of res judicata or certain other principles, "might loosely be described" as a "right not to stand trial." 511 U.S. at 873. The Court therefore held that it is not a "sufficient" basis to allow a collateral appeal that the right at issue might be so characterized. *Id.* at 871. The Court also eschewed any notion of a "single, 'obviously correct way to characterize'" rights subject to immediate appeal, *ibid.* (quoting *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 500 (1989)), in favor of an assessment of the "importance" of the interests at stake, *id.* at 878. *Digital Equipment* establishes, then, that the appropriateness of immediate appeal depends on "a judgment about the

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[3] Moreover, the "merits" of an FTCA suit include not only questions of state tort law incorporated into the FTCA by 28 U.S.C. 1346 and 2674, but also the limitations on the United States' liability as a matter of *federal* law under the exceptions in 28 U.S.C. 2680, which also are incorporated into Sections 1346 and 2674. See pp. 13-16, *infra*.

value of the interests that would be lost" if appeal were not allowed, 511 U.S. at 878-879. See *id.* at 878 (right must "rise to the level of importance needed for recognition under § 1291").

It is clear that the right not to be subject to litigation on a claim that has already been adjudicated can, in appropriate circumstances, satisfy the requirements for immediate appeal. In *Abney* v. *United States*, 431 U.S. 651 (1977), for example, the Court upheld immediate appeal from the denial of a motion to dismiss a second criminal complaint on double jeopardy grounds, recognizing that, after a person has already been subjected to criminal jeopardy once, only immediate appeal could give "full protection" to the constitutional right "not to face trial" for a second time. *Id.* at 662 & n.7. While ordinary res judicata, Section 2676, and the Double Jeopardy Clause each establish a rule of preclusion, there are two features that distinguish Section 2676 from res judicata and place a Section 2676 claim, like a double jeopardy claim, at "the level of importance needed for recognition under § 1291." *Digital Equipment*, 511 U.S. at 878.

First, unlike the common law doctrine of res judicata, the rights protected by the Double Jeopardy Clause and Section 2676 "originat[e] in the Constitution or statutes." *Digital Equipment*, 511 U.S. at 879. In *Digital Equipment*, the Court emphasized that rights not to stand trial that "originat[e] in the Constitution or statutes" have preferred status under the collateral order doctrine because "[w]hen a policy is embodied in a constitutional or statutory provision entitling a party to immunity from suit * * *, there is little room for the judiciary to gainsay its 'importance.'" *Ibid.*; see *ibid.* ("Where statutory and constitutional rights are concerned, 'irretrievabl[e] los[s]' can hardly be trivial.") (alterations in original).

Second, the public interest served by Section 2676—avoiding unnecessary distraction, inhibition, and demoralization of government employees in performance of their public

duties—has already been held to justify immediate appeal. That interest is so important that common law qualified immunity is an exception to the general rule that immunities must have a statutory or constitutional basis in order to warrant review under the collateral order doctrine. See *Digital Equipment*, 511 U.S. at 874-875. Indeed, that interest is so compelling that an employee may appeal his qualified immunity claim at *both* the motion to dismiss stage and again at summary judgment. *Behrens* v. *Pelletier*, 516 U.S. 299, 309 (1996). Those same interests, especially when recognized in statute, amply justify an immediate appeal.

B. Respondents' FTCA Suit Was "An Action Under Section 1346(b)," And The "Judgment" In That Suit Bars Respondents' Action Against Petitioners Individually

Respondents do not dispute as a general matter that the complete bar in Section 2676 applies where, as here, the judgment in the FTCA action was in favor of the United States and also where, as here, the subsequent action against the individual employee is based on *Bivens*. See Gov't Br. 26-28 & n.5. Respondents contend, however, that Section 2676 is inapplicable here (1) because their FTCA suit was not an "action under section 1346(b)," despite the fact that Section 1346(b) was (necessarily) the sole basis for the FTCA suit, Pet. App. 5a, 27a, and (2) because the dismissal of their FTCA suit was not a "judgment" within the meaning of Section 2676. Neither argument has merit.

1. An Action That Asserts The Six Elements In Section 1346(b) Is "An Action Under Section 1346(b)," Even If The Claim Is Ultimately Barred By Section 2680

As discussed in our opening brief (at 31-38), Section 2676's phrase "an action under Section 1346(b)" is directly parallel to the text of the FTCA's exclusivity provisions, which similarly bar suits against agencies or employees where Section 1346(b) is or could be invoked in an effort to hold the United States liable. See 28 U.S.C. 2679(a), (b) and (d). In

specifying that FTCA suits against the United States are exclusive, Section 2679(a) refers to a claim "cognizable under Section 1346(b)," and Section 2679(d)(4) refers to an "action against the United States filed pursuant to section 1346(b)." See also 28 U.S.C. 2679(b)(1) ("The remedy against the United States provided by section[] 1346(b) * * * is exclusive," and "[a]ny other civil action" against the employee relating to the same subject matter "is precluded"). Each of those analogous provisions has been construed to encompass actions that allege the basic elements set forth in Section 1346(b) itself, even though the action may, in the end, be unsuccessful because one of the Section 2680 exceptions bars recovery. See *FDIC* v. *Meyer*, 510 U.S. 471, 477 (1994) ("a claim is actionable under § 1346(b) if it alleges the six elements outlined" therein); *United States* v. *Smith*, 499 U.S. 160, 165-166 (1991); *Audio Odyssey, Ltd.* v. *United States*, 255 F.3d 512, 522 (8th Cir. 2001); *Davric Maine Corp.* v. *USPS*, 238 F.3d 58, 61-64 (1st Cir. 2001); *Franklin Sav. Corp.* v. *United States*, 180 F.3d 1124, 1142-1143 (10th Cir.), cert. denied, 528 U.S. 964 (1999).

Respondents nonetheless argue that an action that fails on account of one of the Section 2680 exceptions cannot be an "action under section 1346(b)" within the meaning of Section 2676 because Section 2680 says that Section 1346(b) "shall not apply" to claims covered by the specified exceptions. Resp. Br. 41-42. That is the same argument that this Court specifically rejected in *Smith*, in which it held that Section 2679(b)(1)'s phrase "[t]he remedy * * * provided by section[] 1346(b)" encompassed the plaintiffs' claim even though, in that case, Section 2680(k)'s foreign country exception meant that "the FTCA itself does not provide a means of recovery." 499 U.S. at 166. The Court made a similar point in *Meyer*, explaining that, under Section 2679(a), "[t]he question is not whether a claim is cognizable *under the FTCA* generally, * * * but rather whether it is 'cognizable *under section 1346(b)*'" in particular. 510 U.S. at 477 n.5.

See *Davric*, 238 F.3d at 62-63 (finding argument regarding Section 2679(a) based on Section 2680's "shall not apply" language "not tenable" in light of the overall statutory scheme).

Respondents argue that the construction of Section 2679(b) and (d) in *Smith* and of Section 2679(a) in *Meyer* and its progeny should be disregarded because of minor variations among the provisions. For example, respondents urge that Section 2679(a)'s phrase "claims * * * cognizable section 1346(b)," at issue in *Meyer*, is somehow broader than Section 2676's phrase "action under section 1346(b)." Resp. Br. 44. Tellingly, respondents offer no definition of "cognizable" to support that assertion, and, contrary to respondents' premise, the phrase "action under section 1346(b)" is, if anything, the *broader* of the two. Whereas the phrase "claims * * * cognizable under section 1346(b)" might connote a claim over which the district court would actually have jurisdiction, see *Black's Law Dictionary* (4th ed. 1951) (defining "cognizable" as "within jurisdiction of court"), the phrase "action under section 1346(b)" is more naturally understood as focusing on the basis for the claim *asserted* by the plaintiff. In any event, this Court has already equated the phrase "cognizable under section 1346(b)" with "actionable under § 1346(b)," *Meyer*, 510 U.S. at 477, and respondents offer no basis for concluding that an "action under section 1346(b)" means something other than a claim that is "actionable under § 1346(b)."

Respondents' effort to distinguish *Smith* fares no better. Respondents note (Br. 46) that *Smith* relied on the language of Section 2679(d)(4) providing that, after substitution of the United States for the federal employee defendant, the suit proceeds as "any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions." But this language proves that Congress regards an FTCA action that is barred on account of "the limitations and exceptions" of Section 2680 to be, nonetheless, an "action

* * * filed pursuant to section 1346(b)." 28 U.S.C. 2679(d)(4). Respondents do not even suggest that the phrase "action * * * filed pursuant to section 1346(b)" in Section 2679(d)(4) is meaningfully different from the phrase "action under section 1346(b)" in Section 2676.

The disparate meanings respondents attribute to these parallel provisions would, moreover, render the statutory scheme unworkable. Assume, for example, that a plaintiff sues a federal employee for a state law tort within the scope of his employment, and, after the United States is substituted, the suit proceeds as an "action * * * filed pursuant to section 1346(b)," 28 U.S.C. 2679(d)(4), and the claim is dismissed based on one of the exceptions in Section 2680. Under respondents' view, the judgment in that "action * * * filed pursuant to section 1346(b)" would not be a judgment in an "action under section 1346(b)," and therefore would not trigger Section 2676's bar to a new suit against the employee. That argument, to borrow respondents' phrase, "requires linguistic gymnastics beyond the flexibility of the English language." Resp. Br. 44. Nor is there any reason why Section 2676's application should depend on whether, as in the example just described, the first suit alleging state tort claims was brought initially against the employee and the United States was substituted or, as here, was brought against the United States under Section 1346(b) in the first instance.

Respondents' construction is also inconsistent with the purposes of Section 2676. In respondents' view, the plaintiff in the example above would be free to start over again, bringing a new action against the federal employee with slightly different allegations designed to avoid the United States' substitution, such as asserting that the employee was acting outside the scope of his employment or acted intentionally rather than negligently, so that the claim would assume constitutional dimension. But there is nothing in either the text or purposes of Section 2676 that would sup-

port such a result. The unwarranted distraction and cost of defending against such repetitive lawsuits is one of the specific ills that the judgment bar was designed to prevent. See *Gilman*, 347 U.S. at 511 n.2 (testimony of Assistant Attorney General Shea); *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994) (Section 2676 reflects Congress's "concern[] about the government's ability to marshal the manpower and finances to defend subsequent suits against its employees"), cert. denied, 515 U.S. 1144 (1995).

This very case in fact exemplifies the problem with respondents' position. Respondents initially sued on a theory that the federal employees had acted negligently in violation of state tort law. See First Restated And Amended Complaint For Damages, No. 02-CV-942, at 6 (N.D.N.Y.) [lodged with the Court]. After the district court entered judgment on March 24, 2003, holding that the negligence claims were barred by the FTCA's detention-of-goods exception, Pet. App. 39a-40a, respondents amended the complaint in their later-filed suit against the employee defendants on May 1, 2003, to assert for the first time that the federal employees had *intentionally* deprived respondents of their property. Compare J.A. 25 ("acts of negligence committed by Defendants") with J.A. 34 ("by intentionally depriving Plaintiffs of their intellectual property").[4] Respondents' attempt (Br. 6) to support the allegation of intentionality with evidence that was not developed until four months after judgment was en-

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[4] Respondents attempt to explain the belated allegation of intent with reference to an expert affidavit. See Resp. Br. 6. The district court twice specifically denied respondents' motions for leave to submit the expert affidavit, C.A. App. A-7 (dkt. no. 32); *ibid.* (dkt. no. 34), but trial counsel nevertheless submitted the affidavit as an attachment to respondents' memorandum in opposition to petitioners' motion to certify the district court's August 20 Order for interlocutory appeal, as to which the affidavit was inapposite. C.A. App. A-8 (dkt. no. 42). In any event, the affidavit reveals that the expert's analysis did not take place until July 2003, two months *after* respondents made their allegation of intentional misconduct. C.A. App. A-36.

tered against them on their negligence claims against the United States (see note 4, *supra*) demonstrates precisely the kind of relitigation of old claims that Section 2676 is designed to prevent. Even under ordinary principles of res judicata, upon which respondents rely, it is clear that a plaintiff cannot avoid claim preclusion simply by offering new evidence and a new theory of liability that were not offered in the first suit. See Restatement (Second) Judgments § 25 (1982) (claim preclusion applies "even though the plaintiff is prepared in the second action * * * [t]o present evidence or grounds or theories of the case not presented in the first").

2. The Judgment Dismissing Respondents' FTCA Action As Barred By the Detention-Of-Goods Exception Was A "Judgment" Within The Meaning Of Section 2676

Respondents argue that, even if their prior suit was an "action under section 1346(b)," the judgment in that case does not trigger Section 2676's bar because, in their view, Section 2676 applies only to judgments on "the merits," whereas a judgment on the basis of a Section 2680 exception is a dismissal for "lack of subject matter jurisdiction." Resp. Br. 26. Respondents' effort to read such an implied limitation into Section 2676 is inconsistent with the text and structure of the FTCA. In any event, respondents' argument fails on its own terms. As numerous courts have recognized, a dismissal on grounds of sovereign immunity *is* a judgment "on the merits" entitled to res judicata (claim preclusive) effect where, as here, the immunity is grounded in a substantive limitation on liability.

a. Respondents' argument is inconsistent with the text of Section 2676 and ignores the substantive nature of the Section 2680 exceptions

The text of Section 2676 does not differentiate between FTCA judgments that are entered for lack of jurisdiction and those that are not. Nor does the text of Section 2676 differentiate between a judgment that rests on a limitation of

liability under *state* law incorporated into Sections 1346(b) and 2674 and a limitation of liability imposed as a matter of *federal* law by Section 2680 and incorporated into Sections 1346(b) and 2674. Respondents' attempt to insert such distinctions into Section 2676 is inconsistent with the substantive nature of the Section 2680 exceptions. That substantive nature is evidenced by: (1) Section 2680's text, which expressly provides that the exceptions limit *both* the district court's jurisdiction under Section 1346(b) *and* the United States' liability under Section 2674, Gov't Br. 39; (2) this Court's repeated references to Section 2680 as a limitation on the United States' substantive FTCA liability, *id.* at 40; (3) the extensive litigation that is often entailed in establishing the applicability of a Section 2680 defense, *id.* at 44-45; and (4) the similarity of certain Section 2680 exceptions and substantive common law defenses to liability, *id.* at 45.

Respondents do not contest any of this. Rather, they attempt to brush it aside with the assertion that "the key inquiry is not whether the exceptions have 'substantive' content, but their role in the FTCA." Resp. Br. 33. As just explained, however, the principal role of the Section 2680 exceptions in the FTCA is to impose limitations on the United States' liability. Where the United States is not liable because of the applicability of one of the exceptions in Section 2680 and judgment is entered for the United States on that ground, both the text and purpose of Section 2676 are triggered. Indeed, it would be bizarre to give, as respondents urge, *greater* preclusive effect within the FTCA's comprehensive remedial scheme to *state* law limitations on the liability of the United States than to such limitations under *federal* law contained in the FTCA itself.

Respondents recognize the absurdities that would result from a purely formalistic adherence to a "lack of jurisdiction" rule in the context of the FTCA, and they therefore acknowledge that, in certain instances, an FTCA dismissal that technically goes to the court's jurisdiction properly *would*,

because of its substantive character, be recognized as a "judgment" within the meaning of Section 2676. For example, Section 1346(b) establishes as a jurisdictional requirement that the complaint allege circumstances under which "a private person[] would be liable to the claimant in accordance with the law of the place where the act or omission occurred." See, *e.g.*, *Bolduc* v. *United States*, 402 F.3d 50, 59 (1st Cir. 2005) (dismissing action for lack of subject matter jurisdiction because Wisconsin law requires an allegation of malice in an action related to law enforcement and the complaint made no such allegation). Respondents acknowledge (Br. 34-35) that such a ground for dismissal would qualify as a "judgment" for purposes of the judgment bar, as, indeed, the courts have held, see, *e.g.*, *Harris* v. *United States*, 422 F.3d 322 (6th Cir. 2005) (dismissing *Bivens* claim against federal employee where the plaintiff's FTCA claim had failed because, among other reasons, the plaintiff had failed to show the malice required by Ohio law).

Respondents attempt to distinguish such application of the judgment bar on the ground that where, as in the FTCA, jurisdiction is defined "in terms of the violation alleged or remedy available," a court ruling that no remedy is available is not "jurisdictional" in the most fundamental sense but is instead an exercise of the court's "authority to adjudicate" whether the statutory requirements for liability are met. Resp. Br. 34-35. Respondents are correct in their assessment of the FTCA's private person liability requirement, but fail to recognize that the same point also applies to the exceptions set forth in Section 2680. The determination by the district court that respondents' FTCA action was covered by the exception in Section 2680(c) likewise was an exercise of its "authority to adjudicate" limitations on the United States' liability in an action brought under Section 1346(b).

As this Court has observed, the FTCA makes the questions of jurisdiction, immunity, and liability coextensive.

Meyer, 510 U.S. at 479 (Section 1346(b) "describes the scope of jurisdiction by reference to claims for which the United States has waived its immunity and rendered itself liable"). The identity of those inquiries is manifested by the fact that the requirement of private party liability under state law is set out in both 28 U.S.C 1346(b), which waives the United States' immunity and grants the courts jurisdiction, and 28 U.S.C. 2674, which defines the United States' liability. The joint jurisdiction/merits inquiry is likewise reflected in the fact that Section 2680 specifies that the exceptions govern *both* "[t]he provisions of this chapter [including Section 2674] and section 1346(b)." 28 U.S.C. 2680.

Respondents cannot explain why the limitation on the United States' FTCA liability that refers to state law, which appears in both Section 1346(b) and Section 2674, should implicate Section 2676's judgment bar, whereas the "exceptions to FTCA liability contained in § 2680," *Molzof* v. *United States*, 502 U.S. 301, 310-311 (1992), which likewise limit both Section 1346(b) and Section 2674, should not.[5]

b. Even if Section 2676 were interpreted with reference to res judicata doctrine, dismissal under Section 2680(c) would qualify as a judgment "on the merits" to which preclusion would attach

Even if the Court were to accept respondents' contention that Section 2676 should be interpreted through the prism of

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[5] Respondents argue (Br. 39-40) that, under petitioners' theory, an FTCA judgment in the government's favor on the ground that the federal employee was not acting within the scope of employment would, under Section 2676, bar the plaintiff from suing the employee directly. That is not so. Claims based on such conduct are wholly beyond the purview of the FTCA. A determination in an action initially filed under the FTCA that the employee was not acting within the scope of employment is the equivalent of a determination under 28 U.S.C. 2679(d), in an action initially filed against the employee, that the United States should not be substituted as the defendant. The consequence of that determination is the same in either case: The claim can proceed against the employee individually.

res judicata doctrine, a Section 2680(c) dismissal would *still* qualify as a judgment triggering Section 2676's bar because dismissals on grounds of sovereign immunity are regarded as judgments "on the merits" for purposes of res judicata where the immunity reflects a substantive limitation on the sovereign's liability.

It has often been noted that the "on the merits"/"lack of jurisdiction" dichotomy in traditional res judicata doctrine is unhelpful because of the lack of clarity in the two terms. The "word 'jurisdiction' * * * can play different roles in different legal contexts," *Rose* v. *Town of Harwich*, 778 F.2d 77, 79-80 (1st Cir. 1985) (Breyer, J.), cert. denied, 476 U.S. 1159 (1986); accord *Kontrick* v. *Ryan*, 540 U.S. 433, 454-455 (2004), and the Second Restatement has abandoned the phrase "on the merits" in the text of the general rule "because of its possibly misleading connotations." Restatement (Second) Judgments § 19, cmt. a (1982). "The *Restatement* means the word ['jurisdiction'] to refer to typical 'jurisdictional' dismissals—where, for example, a plaintiff sues in the wrong court. * * * They rest upon * * * defects of a technical or procedural nature which, if cured, normally ought not to bar a plaintiff from bringing the action again." *Rose*, 778 F.2d at 79-80. See *Dozier* v. *Ford Motor Co.*, 702 F.2d 1189, 1192 (D.C. Cir. 1983) (Scalia, J.) (referring to the jurisdiction exception to res judicata as the "'curable defect' exception," which applies where a precondition that was absent in the first suit can be and is remedied before the second). On the other hand, as this Court has recognized, the phrase "on the merits" encompasses a determination that, though "declining to reach [the] ultimate substantive issues," is "based not on the ground that the distribution of judicial power among the various courts of the State requires the suit to be brought in another court in the State, but on the inaccessibility of all the courts of the State to such litigation." *Angel* v. *Bullington*, 330 U.S. 183, 190 (1947).

Although respondents base their entire argument on the contention that a dismissal on sovereign immunity grounds is for lack of jurisdiction and for that reason is not entitled to res judicata effect (or, therefore, to preclusive effect under Section 2676), they do not discuss a single case that actually addressed res judicata principles in the context of a dismissal on sovereign immunity grounds. In fact, numerous judicial decisions reflect that a dismissal on sovereign immunity grounds does operate as a dismissal "on the merits" when the immunity reflects a substantive limitation on the government's liability (as is clearly the case under the FTCA). See, *e.g.*, *Flores* v. *Edinburg Consol. Indep. Sch. Dist.*, 741 F.2d 773, 775 n.3 (5th Cir. 1984) ("A summary judgment on grounds of sovereign immunity is," under Texas law, "a judgment on the merits for purposes of res judicata."); *Kutzik* v. *Young*, 730 F.2d 149, 151 (4th Cir. 1984) ("In Maryland, a dismissal based on a defense of sovereign immunity meets the final judgment requirement for application of claim preclusion."); *Bloomquist* v. *Brady*, 894 F. Supp. 108, 116 (W.D.N.Y. 1995) ("A dismissal based on sovereign immunity is a decision on the merits, as it determines that a party has no cause of action or substantive right to recover against the United States."); *Beaver* v. *Bridwell*, 598 F. Supp. 90, 93 (D. Md. 1984); *Mills* v. *Lincoln County*, 864 P.2d 1265, 1266-1267 (Mont. 1993); *Annapolis Urban Renewal Auth.* v. *Interlink, Inc.*, 405 A.2d 313, 317 (Md. Ct. Spec. App. 1979); *Herring* v. *Texas Dep't of Corr.*, 500 S.W.2d 718, 720 (Tex. Civ. App. 1973), aff'd, 513 S.W.2d 6 (Tex. 1974). As the Ninth Circuit explained in an FTCA case, whereas, "[o]rdinarily, a case dismissed for lack of subject matter jurisdiction should be dismissed without prejudice so that a plaintiff may reassert his claims in a competent court," if, because of the discretionary function exception, "the bar of sovereign immunity is absolute [and] no other court has the power to hear the case," the case is properly dismissed "with prejudice." *Frigard* v. *United States*, 862 F.2d 201, 204 (9th

Cir. 1988), cert. denied, 490 U.S. 1098 (1989) (citation omitted). See *Midwest Knitting Mills, Inc.* v. *United States*, 741 F. Supp. 1345, 1352 (E.D. Wis. 1990) (same), aff'd, 950 F.2d 1295 (1991).[6]

To be sure, some sovereign immunity dismissals qualify as "jurisdictional" in the "typical" sense that the "plaintiff sue[d] in the wrong court," *Rose*, 778 F.2d at 79-80, or his suit suffered from a "curable defect," *Dozier*, 702 F.2d at 1192. In those cases the first dismissal "does not preclude a party from litigating the same cause of action in *a court of competent jurisdiction*." *Magnus Elecs., Inc.* v. *La Republica Argentina*, 830 F.2d 1396, 1400 (7th Cir. 1987) (dismissal on basis of foreign state's immunity from suit in the United States would not bar suit in another, competent court, but did bar a second suit in federal court). See *GAF Corp.* v. *United States*, 818 F.2d 901, 912-914 (D.C. Cir. 1987) (dismissal of FTCA claim for failure to satisfy exhaustion requirement does not preclude suit after defect has been cured); *Voisin's Oyster House, Inc.* v. *Guidry*, 799 F.2d 183, 188 (5th Cir. 1986) (dismissal on ground of State's Eleventh Amendment immunity in federal court would not bar second suit in court of competent jurisdiction).

The dismissal of respondents' FTCA action on the basis of the detention-of-goods exception did not reflect merely "the distribution of judicial power among the various courts."

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[6] Two other courts of appeals have, in dictum in the context of deciding which Federal Rule of Civil Procedure should govern a Section 2680 dismissal, expressed a view on whether an FTCA judgment in the government's favor on the basis of a Section 2680 exception would have res judicata effect. See *Williams* v. *United States*, 50 F.3d 299, 304-305 (4th Cir. 1995) (dismissal on Section 2680 grounds should be under Rule 12(b)(1) because "dismissal for jurisdictional defects has no *res judicata* effect"); *Wheeler* v. *Hurdman*, 825 F.2d 257, 259 & n.5 (10th Cir.) (FTCA exceptions should be decided under Rule 56, rather than Rule 12(b)(1), because it would then have claim preclusive effect), cert. denied, 484 U.S. 986 (1987). Neither decision, however, contains any sustained analysis of the issue.

Angel, 330 U.S. at 190. Rather, it effectuated an affirmative congressional determination to impose substantive limits on "the liability of the United States under the FTCA." *United States* v. *Gaubert*, 499 U.S. 315, 322 (1991). Where, as here, the basis of the dismissal, even if phrased in jurisdictional terms of sovereign immunity, reflects "'a significant substantive policy'" determination that, "as a substantive matter, the plaintiff cannot maintain his cause of action," the dismissal is "a judgment on the merits" with claim preclusive effect. *Annapolis Urban Renewal*, 405 A.2d at 318-319 (quoting *Weston Funding Corp.* v. *Lafayette Towers, Inc.*, 550 F.2d 710, 714 (2d Cir. 1977)).

* * * * *

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed, and the case remanded with instructions to dismiss the complaint.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

NOVEMBER 2005

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WILL ET AL. *v.* HALLOCK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 04–1332. Argued November 28, 2005—Decided January 18, 2006

In a warranted search of Susan and Richard Hallocks' residence, Customs Service agents seized computer equipment, software, and disk drives. No criminal charges were ever brought, but the equipment was returned damaged, with all of the stored data lost, forcing Susan to close her computer software business. She sued the United States under the Federal Tort Claims Act, invoking the waiver of sovereign immunity, 28 U. S. C. §1346, and alleging negligence by the customs agents in executing the search. While that suit was pending, Susan also filed this action against the individual agents under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, alleging that the damage they caused to her computers deprived her of property in violation of the Fifth Amendment's Due Process Clause. After the District Court dismissed the first suit on the ground that the agents' activities fell within an exception to the Tort Claims Act's waiver of sovereign immunity, §2680(e), the agents moved for judgment in the *Bivens* action. They relied on the Tort Claims Act's judgment bar, §2676, which provides that "the judgment in an action under 1346(b) . . . constitute[s] a complete bar to any action . . . against the employee of the government whose act or omission gave rise to the claim." The District Court denied the motion, holding that dismissal of the Tort Claims Act suit against the Government failed to raise the Act's judgment bar. The Second Circuit affirmed, after first ruling in favor of jurisdiction under the collateral order doctrine. Under this doctrine, appellate authority to review "all final decisions of the district courts," §1291, includes jurisdiction over "a narrow class of decisions that do not terminate the litigation," but are sufficiently important and collateral to the merits that they should "nonetheless be treated as 'final.'" *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511

Syllabus

U. S. 863, 867.

Held: A refusal to apply the Federal Tort Claims Act's judgment bar is not open to collateral appeal. Pp. 4–9.

(a) Three conditions are required for collateral appeal: the order must "[1] conclusively determine the disputed question; [2] resolve an important issue completely separate from the merits . . . , and [3] be effectively unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S. 139, 144. Those conditions are "stringent." *Digital Equipment, supra,* at 868. Unless they are kept so, the underlying doctrine will overpower the substantial finality interests §1291 is meant to further. Pp. 3–4.

(b) Among the "small class" of orders this Court has held to be collaterally appealable are those rejecting absolute immunity, *Nixon* v. *Fitzgerald*, 457 U. S. 731, 742, qualified immunity, *Mitchell* v. *Forsyth*, 472 U. S. 511, 530, and a State's Eleventh Amendment immunity claim, *Puerto Rico Aqueduct, supra,* at 144–145. In each of these cases, the collaterally appealing party was vindicating or claiming a right to avoid trial, in satisfaction of the third condition: unless the order to stand trial was immediately appealable the right would be effectively lost. However, to accept the generalization that any order denying a claim of right to prevail without trial satisfies the third condition would leave §1291's final order requirement in tatters. See *Digital Equipment, supra,* at 872–873. Pp. 4–5.

(c) Thus, only some orders denying an asserted right to avoid the burdens of trial qualify as orders that cannot be reviewed "effectively" after a conventional final judgment. The further characteristic that merits collateral appealability is "a judgment about the value of the interests that would be lost through rigorous application of the final judgment requirement." *Digital Equipment, supra,* at 878–879. In each case finding appealability, some particular value of a high order was marshaled in support of the interest in avoiding trial, *e.g.*, honoring the separation of powers, *Nixon, supra,* at 749, 758, preserving the efficiency of government and the initiative of its officials, *Mitchell, supra,* at 526, and respecting a State's dignitary interests, *Puerto Rico Aqueduct, supra,* at 146. It is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest that counts. *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468. Pp. 5–7.

(d) The customs agents' claim here does not serve a weighty public objective. This case must be distinguished from qualified immunity cases. The nub of such immunity is the need to induce government officials to show reasonable initiative when the relevant law is not "clearly established." *Harlow* v. *Fitzgerald*, 457 U. S. 800, 817; a

Syllabus

quick resolution of a qualified immunity claim is essential. There is, however, no such public interest at stake simply because the judgment bar is said to be applicable. It is the avoidance of litigation for its own sake that supports the bar, and if simply abbreviating litigation troublesome to government employees were important enough, §1291 would fade out whenever the government or an official lost in an early round. Another difference between qualified immunity and the judgment bar lies in the bar's essential procedural element. While a qualified immunity claim is timely from the moment an official is served with a complaint, the judgment bar can be raised only after a case under the Tort Claims Act has been resolved in the Government's favor. The closer analogy to the judgment bar is the defense of res judicata. Both are grounded in the perceived need to avoid duplicative litigation, not in a policy of freeing a defendant from any liability. But this rule of respecting a prior judgment by giving a defense against relitigation has not been thought to protect values so important that only immediate appeal can effectively vindicate them. See *Digital Equipment, supra*, at 873. Pp. 7–9.

387 F. 3d 147, vacated and remanded.

SOUTER, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–1332

RICHARD WILL, ET AL., PETITIONERS *v.* SUSAN HALLOCK ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[January 18, 2006]

JUSTICE SOUTER delivered the opinion of the Court.

The authority of the Courts of Appeals to review "all final decisions of the district courts," 28 U. S. C. §1291, includes appellate jurisdiction over "a narrow class of decisions that do not terminate the litigation," but are sufficiently important and collateral to the merits that they should "nonetheless be treated as final," *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U. S. 863, 867 (1994) (internal quotation marks omitted). The issue here is whether a refusal to apply the judgment bar of the Federal Tort Claims Act is open to collateral appeal. We hold it is not.

I

The complaint alleges that Susan Hallock owned a computer software business that she and her husband, Richard, operated from home. After information about Richard Hallock's credit card was stolen and used to pay the subscription fee for a child pornography Web site, agents of the United States Customs Service, investigating the Web site, traced the payment to Richard Hallock's card and got a warrant to search the Hallocks' residence.

With that authority, they seized the Hallocks' computer equipment, software, and disk drives. No criminal charges were ever brought, but the Government's actions produced a different disaster. When the computer equipment was returned, several of the disk drives were damaged, all of the stored data (including trade secrets and account files) were lost, and the Hallocks were forced out of business.

In July 2002, Susan Hallock and her company brought an action against the United States under the Federal Tort Claims Act, invoking the waiver of sovereign immunity, 28 U. S. C. §1346, and alleging negligence by the customs agents in executing the search. The merits of the claim were never addressed, for the District Court granted the Government's motion to dismiss, holding that the agents' activities occurred in the course of detaining goods and thus fell within an exception to the Act's waiver of sovereign immunity, §2680(e). *Hallock* v. *United States*, 253 F. Supp. 2d 361 (NDNY 2003).

While the suit against the Government was still pending, Susan Hallock filed this action against the individual agents under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), alleging in her complaint that the agents had damaged her computers and thus deprived her of property including business income in violation of the Due Process Clause of the Fifth Amendment. After the District Court dismissed the first suit against the Government, the agents moved for judgment in the *Bivens* action, citing the judgment bar of the Tort Claims Act, that "the judgment in an action under 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." §2676.

The District Court denied the motion, holding that dismissal of the action against the Government under the Tort Claims Act was solely on a procedural ground, and

thus failed to raise the judgment bar. *Hallock* v. *Bonner*, 281 F. Supp. 2d 425, 427 (NDNY 2003). The Court of Appeals for the Second Circuit affirmed, after first finding jurisdiction under the collateral order doctrine. *Hallock* v. *Bonner*, 387 F. 3d 147 (2004). We granted certiorari to consider the judgment bar, 545 U. S. ___ (2005), but now vacate for want of appellate jurisdiction on the part of the Court of Appeals.

II

The collateral order doctrine, identified with *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), is "best understood not as an exception to the 'final decision' rule laid down by Congress in §1291, but as a 'practical construction' of it." *Digital Equipment, supra,* at 867 (quoting *Cohen, supra,* at 546). Whereas 28 U. S. C. §1291 "gives courts of appeals jurisdiction over 'all final decisions' of district courts" that are not directly appealable to us, *Behrens* v. *Pelletier*, 516 U. S. 299, 305 (1996), the collateral order doctrine accommodates a "small class" of rulings, not concluding the litigation, but conclusively resolving "claims of right separable from, and collateral to, rights asserted in the action," *ibid.* (internal quotation marks omitted). The claims are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen, supra,* at 546.

The requirements for collateral order appeal have been distilled down to three conditions: that an order "'[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.'" *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S. 139, 144 (1993) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978)). The conditions are "stringent," *Digital*

Equipment, supra, at 868 (citing *Midland Asphalt Corp.* v. *United States,* 489 U. S. 794, 799 (1989)), and unless they are kept so, the underlying doctrine will overpower the substantial finality interests §1291 is meant to further: judicial efficiency, for example, and the "sensible policy 'of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise.'" *Firestone Tire & Rubber Co.* v. *Risjord,* 449 U. S. 368, 374 (1981) (quoting *Cobbledick* v. *United States,* 309 U. S. 323, 325 (1940)).

Accordingly, we have not mentioned applying the collateral order doctrine recently without emphasizing its modest scope. See, *e.g., Digital Equipment,* 511 U. S., at 868 ("[T]he 'narrow' exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered . . . " (citation omitted)). And we have meant what we have said; although the Court has been asked many times to expand the "small class" of collaterally appealable orders, we have instead kept it narrow and selective in its membership.

A

Prior cases mark the line between rulings within the class and those outside. On the immediately appealable side are orders rejecting absolute immunity, *Nixon* v. *Fitzgerald,* 457 U. S. 731, 742 (1982), and qualified immunity, *Mitchell* v. *Forsyth,* 472 U. S. 511, 530 (1985). A State has the benefit of the doctrine to appeal a decision denying its claim to Eleventh Amendment immunity, *Puerto Rico Aqueduct, supra,* at 144–145, and a criminal defendant may collaterally appeal an adverse ruling on a defense of double jeopardy, *Abney* v. *United States,* 431 U. S. 651, 660 (1977).

The examples admittedly raise the lawyer's temptation

to generalize. In each case, the collaterally appealing party was vindicating or claiming a right to avoid trial, in satisfaction of the third condition: unless the order to stand trial was immediately appealable, the right would be effectively lost. Those seeking immediate appeal therefore naturally argue that any order denying a claim of right to prevail without trial satisfies the third condition. But this generalization is too easy to be sound and, if accepted, would leave the final order requirement of §1291 in tatters. We faced this prospect in *Digital Equipment, supra,* an appeal from an order rescinding a settlement agreement. Petitioner asserted a "'right not to stand trial' requiring protection by way of immediate appeal," analogizing the rescission to a denial of immunity. *Id.,* at 869. We said no, however, lest "every right that could be enforced appropriately by pretrial dismissal [be] loosely . . . described as conferring a 'right not to stand trial.'" *Id.,* at 873. Otherwise, "almost every pretrial or trial order might be called 'effectively unreviewable' in the sense that relief from error can never extend to rewriting history." *Id.,* at 872.

> "Allowing immediate appeals to vindicate every such right would move §1291 aside for claims that the district court lacks personal jurisdiction, that the statute of limitations has run, that the movant has been denied his Sixth Amendment right to a speedy trial, that an action is barred on claim preclusion principles, that no material fact is in dispute and the moving party is entitled to judgment as a matter of law, or merely that the complaint fails to state a claim. Such motions can be made in virtually every case." *Id.,* at 873 (citations omitted).

B

Since only some orders denying an asserted right to avoid the burdens of trial qualify, then, as orders that

cannot be reviewed "effectively" after a conventional final judgment, the cases have to be combed for some further characteristic that merits appealability under *Cohen;* and as *Digital Equipment* explained, that something further boils down to "a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." 511 U. S., at 878–879 (citing *Van Cauwenberghe* v. *Biard,* 486 U. S. 517, 524 (1988)). See also *Lauro Lines s.r.l.* v. *Chasser,* 490 U. S. 495, 502 (1989) ("The importance of the right asserted has always been a significant part of our collateral order doctrine" (SCALIA, J., concurring)).

Thus, in *Nixon, supra,* we stressed the "compelling public ends," *id.*, at 758, "rooted in . . . the separation of powers," *id.*, at 749, that would be compromised by failing to allow immediate appeal of a denial of absolute Presidential immunity, *id.*, at 743, 752, n. 32. In explaining collateral order treatment when a qualified immunity claim was at issue in *Mitchell, supra,* we spoke of the threatened disruption of governmental functions, and fear of inhibiting able people from exercising discretion in public service if a full trial were threatened whenever they acted reasonably in the face of law that is not "clearly established." *Id.*, at 526. *Puerto Rico Aqueduct,* 506 U. S. 139, explained the immediate appealability of an order denying a claim of Eleventh Amendment immunity by adverting not only to the burdens of litigation but to the need to ensure vindication of a State's dignitary interests. *Id.*, at 146. And although the double jeopardy claim given *Cohen* treatment in *Abney, supra,* did not implicate a right to be free of all proceedings whatsoever (since prior jeopardy is essential to the defense), we described the enormous prosecutorial power of the Government to subject an individual "to embarrassment, expense and ordeal . . . compelling him to live in a continuing state of anxiety," *id.*, at 661–662 (internal quotation marks omitted); the

only way to alleviate these consequences of the Government's superior position was by collateral order appeal.

In each case, some particular value of a high order was marshaled in support of the interest in avoiding trial: honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual. That is, it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is "effectively" unreviewable if review is to be left until later. *Coopers & Lybrand*, 437 U. S., at 468.

C

Does the claim of the customs agents in this case serve such a weighty public objective that the judgment bar should be treated as an immunity demanding the protection of a collateral order appeal? One can argue, of course, that if the *Bivens* action goes to trial the efficiency of Government will be compromised and the officials burdened and distracted, as in the qualified immunity case: if qualified immunity gets *Cohen* treatment, so should the judgment bar to further litigation in the aftermath of the Government's success under the Tort Claims Act. But the cases are different. Qualified immunity is not the law simply to save trouble for the Government and its employees; it is recognized because the burden of trial is unjustified in the face of a colorable claim that the law on point was not clear when the official took action, and the action was reasonable in light of the law as it was. The nub of qualified immunity is the need to induce officials to show reasonable initiative when the relevant law is not "clearly established," *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982); see also *Saucier* v. *Katz*, 533 U. S. 194, 202 (2001); a quick resolution of a qualified immunity claim is essential.

There is, however, no such public interest at stake simply because the judgment bar is said to be applicable. It is not the preservation of initiative but the avoidance of litigation for its own sake that supports the judgment bar, and if simply abbreviating litigation troublesome to Government employees were important enough for *Cohen* treatment, collateral order appeal would be a matter of right whenever the government lost a motion to dismiss under the Tort Claims Act, or a federal officer lost one on a *Bivens* action, or a state official was in that position in a case under 42 U. S. C. §1983, or *Ex parte Young*, 209 U. S. 123 (1908). In effect, 28 U. S. C. §1291 would fade out whenever the government or an official lost an early round that could have ended the fight.

Another difference between qualified immunity and the judgment bar lies in the bar's essential procedural element. While a qualified immunity claim is timely from the moment an official is served with a complaint, the judgment bar can be raised only after a case under the Tort Claims Act has been resolved in the Government's favor. If a *Bivens* action alone is brought, there will be no possibility of a judgment bar, nor will there be so long as a *Bivens* action against officials and a Tort Claims Act against the Government are pending simultaneously (as they were for a time here). In the present case, if Susan Hallock had brought her *Bivens* action and no other, the agents could not possibly have invoked the judgment bar in claiming a right to be free of trial. The closer analogy to the judgment bar, then, is not immunity but the defense of claim preclusion, or res judicata.

Although the statutory judgment bar is arguably broader than traditional res judicata, it functions in much the same way, with both rules depending on a prior judgment as a condition precedent* and neither reflecting a

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* The right to be free of double jeopardy is subject to an analogous

policy that a defendant should be scot free of any liability. The concern behind both rules is a different one, of avoiding duplicative litigation, "multiple suits on identical entitlements or obligations between the same parties." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4402, p. 9 (2d ed. 2002) (internal quotation marks omitted). But this rule of respecting a prior judgment by giving a defense against relitigation has not been thought to protect values so great that only immediate appeal can effectively vindicate them. As we indicated in *Digital Equipment*, in the usual case, absent particular reasons for discretionary appeal by leave of the trial court, a defense of claim preclusion is fairly subordinated to the general policy of deferring appellate review to the moment of final judgment. 511 U. S., at 873.

The judgment bar at issue in this case has no claim to greater importance than the typical defense of claim preclusion; and we hold true to form in deciding what *Digital Equipment* implied, that an order rejecting the defense of judgment bar under 28 U. S. C. §2676 cries for no immediate appeal of right as a collateral order.

We vacate the judgment of the Court of Appeals and remand with instructions to dismiss the appeal for lack of jurisdiction.

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condition, that jeopardy have attached in a prior proceeding. *Monge* v. *California*, 524 U. S. 721, 728 (1998), a characteristic that distinguishes the Fifth Amendment right from other immunities mentioned above. But, as we explained, double jeopardy deserves immunity treatment under §1291 owing to the enormous advantage of a government prosecutor who chooses to go repeatedly against an individual.